

DATE: May 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-15985

**DECISION OF ADMINISTRATIVE JUDGE**

**BURT SMITH**

**APPEARANCES**

**FOR GOVERNMENT**

Jonathan A. Beyer, Esq., Department Counsel

**FOR APPLICANT**

A. Shane Mattingly, Esq.

**SYNOPSIS**

Applicant's excessive alcohol consumption, false official statements, and criminal conduct cause doubt as to his reliability and personal judgment in a security environment. Clearance is denied.

**STATEMENT OF THE CASE**

On August 20, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. It recommended referral to an Administrative Judge to determine whether a clearance should be granted or denied.

Applicant responded to the SOR through counsel in a written answer notarized on September 13, 2002, in which he requested a hearing. The case was assigned to me on October 24, 2002. On November 5, 2002, a Notice of Hearing was issued scheduling the hearing on December 19, 2002. The hearing was commenced on the scheduled date, but an unanticipated delay required a continuance until January 22, 2003. (See transcript, December 19, 2002.) At the hearing, the Government submitted five documentary exhibits. Applicant testified, and he submitted three documentary exhibits. The transcript (Tr.) was received by DOHA on February 4, 2003.

**FINDINGS OF FACT**

**Paragraph 1 (Guideline G - Alcohol Consumption).** The Applicant is 47 years old and unmarried, and he holds a BS degree. He is employed by a defense contractor as an electrical engineer. (Tr. 35.)

Applicant was arrested in 1995 for the offense of DWI, and his breathalyzer was .20 percent. He was convicted, and he was sentenced to probation and a fine. Four years later, in December 1999, Applicant was again arrested for an alcohol-

related driving offense. Two months later on February 10, 2000, before the earlier case was adjudicated, Applicant was arrested a third time for DUI. On October 20, 2000, in a joint disposition of the two cases, Applicant was convicted of the December 1999 offense, and he was sentenced to confinement for 60 days. His driving privileges were restricted and an "interlocking device" was placed on his car for 18 months. (Gov. Ex. 2.) The DUI offense of February 2000 was dismissed as part of the joint disposition.

In his answer to the SOR, Applicant admits the arrests and states he has undergone alcohol counseling. At the hearing, Applicant presented a certificate of completion he received after attending an alcohol education course. (App. Ex. B.)

Applicant concedes he has had a problem with alcohol. He testified "I just like to go out a lot. I am single, and my objective is to go out." (Tr. 16.) As to what the alcohol educational course taught him, Applicant testified "Well, the classes are one thing, but I learned just don't drink and drive in [X] county if you want to survive down there." (Tr. 17.) Applicant believes the local police are overzealous in law enforcement (Tr. 68), and he has learned not to drink and drive (Tr. 25, 62). Applicant now drinks at home each weekend and sometimes on week nights as well. (Tr. 26, 64.) Applicant's work supervisor states Applicant is a reliable employee and "a key member" of the staff. (App. Ex. A.)

Applicant's history of traffic offenses indicates excessive alcohol consumption on his part, not likely restricted to the three times he was arrested. His testimony concerning alcohol education and reform indicates he learned little more than not to drink and drive. He continues to drink alcohol most days/evenings of the week. It is found that, more probable than not, Applicant's past excessive drinking has not been significantly reformed.

Paragraph 2 (Guideline E - Personal Conduct). On October 19, 1998, Applicant completed a Security Clearance Application (SF86) containing requests for specific information about his personal background. (Gov Ex. 1.) After answering the questions on the SF86, Applicant signed the form under a certification of truth which informed him that knowing and willful falsifications may be punishable under criminal laws.

Question 24 of the SF86 asked Applicant if he was "ever charged with or convicted of any offense(s) related to alcohol or drugs." Applicant answered "No," although he had been arrested and convicted of DWI in 1995. In his written answer and at the hearing, Applicant explained he remembered the arrest, but he thought the record had been expunged. (Tr. 45.) In January 1990, Applicant was also charged with an offense related to drugs, but he did not identify that arrest. The 1990 drug charges were later dismissed, and Applicant testified he believed this circumstance was justification for providing a negative answer. (Tr. 24.)

Applicant's explanations for his failure to identify his arrests in 1990 and 1995 have been considered. However, the question is clear and unequivocal, and Applicant's explanations are not credible as justification for his negative answers.

Question 32 asked Applicant if he ever had "a clearance denied, suspended, or revoked." (Gov. Ex. 1.) Applicant answered "No," although his clearance was suspended in 1990 after his employing federal agency learned of the 1990 drug arrest. (Gov. Ex. 3.) In his written answer, Applicant stated he was not aware of the suspension. However, Applicant conceded at the hearing he knew in about 1990 his clearance had been suspended. (Tr. 48-49.) Because Applicant was aware of the clearance suspension at the time he completed the SF86, he was obligated to answer the question truthfully.

Taking all the evidence into account, I find Applicant knowingly and willfully entered false information on the SF86, as alleged.

Paragraph 3 (Guideline J - Criminal Conduct). Allegations of criminal conduct set forth under subparagraph 3.a. refer to the multiple arrests previously alleged and discussed under paragraph 1 above, pertaining to Guideline G. The factual findings entered under paragraph 1 are therefore incorporated herein.

In subparagraph 3.b., the Government alleges Applicant was arrested on January 12, 1990, for Possession of Marijuana and he was convicted of the offense. The record reveals Applicant and a co-defendant were each arrested and charged. However, counsel for both sides mutually agree that all charges against Applicant were dismissed, and only the co-defendant was convicted. (Tr. 20-21, 43, 75.) Due to the dismissal of charges, the Government's allegations of criminal conduct under subparagraph 3.b. lack support.

In subparagraph 3.c., the Government alleges Applicant engaged in felony misconduct under 18 U.S.C. 1001 when he knowingly and willfully provided false material answers on the security clearance form SF86 that he completed on October 19, 1998. (Gov. Ex. 1.) Factual findings pertaining to these false statements were discussed and entered under paragraph 2 above, as they relate to Guideline E, and the findings are incorporated herein.

### POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2001, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny a security clearance (Disqualifying Conditions, hereafter DC) and those that may be considered in deciding whether to grant a clearance (Mitigating Conditions, hereafter MC).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline G - Alcohol Consumption. *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.

Disqualifying Conditions applicable:

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 use;

Mitigating Conditions applicable:

(None have application.)

Guideline E - Personal Conduct. *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.

Disqualifying Conditions applicable:

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;
4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional or community standing or render the person susceptible to blackmail;

Mitigating Conditions applicable:

(None have application.)

Guideline J - Criminal Conduct. *The concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. A single serious crime or multiple lesser offenses.

Mitigating Conditions applicable:

(None have application.)

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, or duress; and (9) the likelihood of continuation or recurrence.

## CONCLUSIONS

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted upon to safeguard it 24 hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in excessive alcohol consumption, false official statements, and/or criminal activity demonstrating irresponsibility or a lack of trustworthiness. On a commonsense basis, these unfavorable personal characteristics might easily contribute to a disregard of rules and procedures designed to protect classified defense secrets.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

Paragraph 1 (Guideline G - Alcohol Consumption). Evidence of excessive alcohol consumption by Applicant is seen in his three incidents of driving while intoxicated between 1995 and 2000. (MC 1.) It is reasonable to conclude Applicant was drinking heavily and the three incidents are indicative of his high level of alcohol consumption. It is not reasonable to conclude these were the only incidents of excessive drinking.

Applicant has completed an alcohol education course. However, Applicant's testimony makes clear he learned only that he should not drink and drive, and he continues to consume alcohol at home on a regular basis. Applicant has a demonstrated history of drinking to excess, and he presents no credible evidence to support a conclusion he has reformed his habits. Paragraph 1 is concluded against Applicant.

Paragraph 2 (Guideline E - Personal Conduct). As discussed above, Applicant willfully furnished false or incomplete answers to the Government in 1998 when he completed the SF86 application for a security clearance. (DC 2.)

In responding to two questions, Applicant knowingly and willfully failed to admit that he was arrested and convicted for DWI in 1995, and that he was arrested and charged with a drug offense in 1990, although the charge was later dismissed. By intentionally giving false information to the Government, Applicant put himself in a position of vulnerability to coercion by unfriendly agents or other persons who might seek to bring pressure against clearance holders in the US security program. (DC 4.)

Applicant's various explanations have been discussed and considered (*e.g.*, expunging of court records and lack of recall) but these explanations are not credible and do not mitigate Applicant's failure to be honest with the Government. Paragraph 2 is concluded against Applicant.

Paragraph 3 (Guideline J - Criminal Conduct). Applicant was twice convicted of alcohol-related driving offenses, and a third charge was dismissed as part of a joint disposition. DC 1 has application. Applicant's testimony in mitigation has been considered, but he consistently blamed his apprehensions for criminal conduct on overzealous police officers. Applicant has not gained insight into the need to accept personal responsibility for his illegal behavior, and he provides no evidence upon which a conclusion of reform and rehabilitation might be based. Subparagraph 3.a. is concluded

against Applicant.

Subparagraph 3.b. is concluded in Applicant's favor. The record reveals that drug charges related to this allegation were dismissed, although a conviction was entered against a co-defendant.

Concerning subparagraph 3.c., Applicant knowingly and willfully provided false material information to the Government, as concluded under paragraph 2. Although not arrested or convicted, Applicant's willful misconduct violates the prohibitions of 18 U.S.C. 1001 and may be considered as part of an administrative determination of his security worthiness. Paragraph 3.c. of the SOR is concluded against Applicant for this purpose.

In reaching the above conclusions, each factor of the "whole person concept" has been considered as to all allegations in the SOR. For reasons stated in the above discussion, Applicant does not bring himself favorably withing the whole person concept, particularly with regard to factors (1) and (3).

On balance, it is concluded the Government has met its burden of proving factual allegations in the SOR, except as to subparagraph 3.b. For his part, the Applicant has failed to introduce persuasive evidence in refutation, mitigation, or changed circumstances which offsets or outweighs the Government's case.

### **FORMAL FINDINGS**

Formal findings For or Against the 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: Against the Applicant.

Subparas. 1.a.-1.c.: Against the Applicant.

Paragraph 2. Personal Conduct: Against the Applicant.

Subparas. 2.a.-2.b.: Against the Applicant.

Paragraph 3. Criminal Conduct: Against the Applicant.

Subpara. 3.a.: Against the Applicant.

Subpara. 3.b.: For the Applicant.

Subpara. 3.c.: 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 Applicant's request for a security clearance.

Burt Smith

Administrative Judge