

DATE: September 22, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-26980

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was convicted of four alcohol-related offenses between 1978 and 1999. She entered into alcohol abuse treatment on three occasions, has admitted that she has an alcohol problem, and she considers herself an alcoholic. Despite the legal problems alcohol has caused in her life and her acknowledged alcoholism, she continues to drink beer on a regular basis. Clearance is denied.

**STATEMENT OF THE CASE**

On January 13, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline G (alcohol consumption) and J (criminal conduct). Applicant submitted a response to the SOR, dated February 13, 2003, requesting a clearance decision based on the written record without a hearing. In her response to the SOR, Applicant admitted the substance of all allegations contained in the SOR, with modifications, except that alleging application of 10 U.S.C. § 986, to which she made no response.

Department Counsel prepared a File of Relevant Material (FORM) on April 18, 2003, that was mailed to Applicant on the same day. Applicant submitted a written response to the FORM dated May 28, 2003 that contained five exhibits, including character reference letters. Department Counsel indicated he did not object to the admissibility of Applicant's response or the attachments thereto.

**FINDINGS OF FACT**

Applicant's partial admissions to the allegations contained in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and character reference letters, I make the following findings of fact:

Applicant is a 45-year-old single woman employed by a defense contractor as a lead-person in toolbox shadowing. She graduated from a trade school in 1996 and was hired by her present employer on September 4, 2000. Her employment history before her present job discloses she worked

for one employer as a preventive maintenance mechanic from December 1989 to August 1996. Applicant then worked for nine separate employers and experienced two periods of unemployment between 1996 and 2000.

Applicant's first alcohol-related offense occurred in approximately 1978 when she was in her early twenties. She was initially stopped by police because a taillight in the vehicle she was driving was inoperative, and was thereafter charged with Driving While Intoxicated (DWI). She believes she was most likely convicted of a reduced offense, but admits paying large fine. She was next arrested and charged with DWI on July 24, 1994. A police officer stopped her because she was weaving outside her lane of traffic. She failed field sobriety tests and registered a blood alcohol concentration (BAC) of .117 when she was administered a breathalyser test. She pled guilty to the reduced offense of Careless and Imprudent Driving and was fined approximately \$2,500.00. She was also required to attend an alcohol awareness class.

Applicant was again arrested for DWI on December 27, 1995. On this occasion, Applicant had gotten into a verbal and physical altercation in her apartment with a woman friend with whom she had been drinking. Applicant left the apartment when the friend indicated she was going to call the police. Police officers observed Applicant speeding and a pursuit ensued when they attempted to stop her. When she finally stopped, the arresting officer observed that she was naked from her waist up. Applicant had to be physically restrained by the arresting officer and thereafter refused to submit to a breathalyser test. She pled guilty to DWI, was fined approximately \$700.00, and her driving privileges were revoked for one year.

Applicant's last arrest for DWI occurred on December 30, 1999. A police officer observed her driving her vehicle at a speed of 60 mph in a 35-mph zone. She failed a field sobriety test and refused to submit to a breathalyser test. The SOR alleges that Applicant pled guilty to a reduced charge of careless and imprudent driving for this offense, was fined \$500.00, and sentenced to a two year suspended sentence. According to Government Exhibit 7, attached to the FORM, Applicant pled guilty to a charge described "BAC" and was sentenced to 2 year SES for this offense. The government did not submit any information clarifying the meaning of the entries in Government Exhibit 7. Applicant, denied part of this allegation in her answer to the SOR, but admitted "December 1995 . . . for driving while intoxicated." Applicant indicated in Interrogatories she submitted on October 2, 2002 that she was convicted of DWI, placed on 2 years probation, and ordered to attend an alcohol awareness class and Alcoholics Anonymous (AA) meetings. She attended a total of six AA meetings. Her driving privileges were again revoked for one year.

Applicant voluntarily sought treatment for alcohol abuse in approximately 1994 or 1995, in addition to the two court ordered alcohol awareness classes Applicant attended. She saw a counselor at that time on three occasions with each session lasting two hours. Despite the multiple treatments she has received for alcohol abuse, and based on her admissions, Applicant continues to have an alcohol abuse problem and considers herself to be an alcoholic.

Applicant was consuming on average twenty-four 12-ounce beers each week until early 2001. She thereafter claims to have reduced her consumption on average to twelve 12-ounce beers each week as of October 15, 2001 and then to six 12-ounce beers each month as of October 2, 2002. While no factual determination is possible concerning the actual amount of alcohol she presently consumes, she is still consuming some amount of alcohol despite multiple legal problems, treatments, and her self-diagnosis as an alcoholic.

### POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chiefs among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guidelines G, pertaining to alcohol consumption and J, pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

### BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>(4)</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(11)</sup>

## CONCLUSIONS

Under Guideline G, alcohol consumption is a security concern because 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. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication may affect an individual's ability to exercise the care, judgment, and discretion necessary to protect classified information.

Applicant continues to consume alcohol despite experiencing the numerous adverse legal consequences detailed above as a result of her excessive drinking, and having attended two alcohol awareness classes, three self-referred alcohol counseling sessions, and a number of AA meetings. The security concern caused by her past conduct and continued use of alcohol is compounded by the fact that she is fully aware that she has an alcohol abuse problem and considers herself to be an alcoholic and yet continues to drink alcohol.

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 use*; and 5: *Habitual or binge consumption of alcohol to the point of impaired judgment* apply in this case.

Applicant submitted several character reference letters with her response to the FORM that indicate she is performing well in her present employment and is thought of as an honest, trustworthy, and generally a very good employee. However, because of her continued use of alcohol despite the repeated adverse consequences that have befallen her as the result of her alcohol abuse, I cannot find that any Mitigating Condition applies. Accordingly, she is unable to mitigate this security concern.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information. Additionally, the statutory disqualification imposed by 10 U.S.C. § 986 prohibits granting a security clearance to a person who has been convicted of a crime and sentenced to imprisonment for a term exceeding one year.

The sole Guideline J concern alleged in the SOR is that Applicant is statutorily prohibited from being granted a security clearance by application of 10 U.S.C. § 986. In support of this contention subparagraph 2a of the SOR referenced subparagraph 1b of the SOR that alleged the following:

"In December 1999, the (jurisdiction omitted) Police Department arrested you for driving while intoxicated, speeding, and improper lane usage. Subsequently, you plead guilty to a reduced charge of careless and imprudent driving. Consequently, you were fined \$500.00, and sentenced to a two year suspended sentence."

Department Counsel refers to Government Exhibit 7 as support for the applicability of 10 U.S.C. § 986 to Applicant. Government Exhibit 7 consists of police reports from a different jurisdiction than that alleged in subparagraph 1b of the SOR that disclose Applicant's arrest on December 30, 1999, and charges of Speeding, Improper Lane Use (Weaving) and DWI being filed against her. Also included in Government Exhibit 7 is a note from the municipal court clerk of the same jurisdiction as that of the arresting agency noted in the police reports that, without referring to the arrest reflected in the police reports, discloses the following dispositions: speeding-nolle prosequi, BAC-2 year SES, improper lane use-nolle prosequi.

Applicant denied in her response to SOR the December 1999 speeding and improper lane usage, but admitted a December 1995 DWI conviction in the jurisdiction alleged in subparagraph 1c of the SOR. The jurisdiction alleged in subparagraph 1c of the SOR is, according to police reports submitted as government exhibits, the correct place of arrest for Applicant's December 1995 DWI, although the place of conviction alleged in subparagraph 1c is apparently the actual place of conviction for the offense alleged in subparagraph 1b based upon it being the same jurisdiction that is contained in the police reports and clerk's note that the government included in the FORM as Government Exhibit 7.

In the statement Applicant provided to a special agent from the Defense Security Service on October 15, 2001, she provided information on arrests from both the jurisdiction listed in subparagraph 1b and the jurisdiction identified in Government Exhibit 7, claiming that both arrests occurred on December 29, 1995. In answers she provided on October 2, 2002, in response to interrogatories propounded to her, Applicant properly identified the dates of the two arrests and indicated she was sentenced to 2 years probation and other conditions for the offense indicated in Government Exhibit 7. Applicant also acknowledged in that response that she was convicted of the offense of careless and imprudent driving as a result of her arrest for the offense alleged in subparagraph 1d of the SOR.

Contrary to the government's assertion in subparagraph 1b that Applicant was convicted of two relatively minor traffic offenses and sentenced to a two year suspended sentence, <sup>(12)</sup> Government Exhibit 7 reflects that the minor offenses were dismissed and she was convicted of BAC. <sup>(13)</sup> Government Exhibit 7 also discloses she was sentenced to 2 year SES, although the government neither provided information to indicate what that term means nor requested that I take administrative notice of an apparent colloquial term from the jurisdiction involved. <sup>(14)</sup>

The only definite conclusions that can be drawn pertaining to the applicability of 10 U.S.C. 986 in this case are that Applicant has been arrested and

convicted on three occasions since 1994 for alcohol related driving offenses, and the government has jumbled the facts from those three arrests and alleged them in an absurd and confusing fashion in three subparagraphs of the SOR. As noted earlier, the government has the burden of proving controverted facts by something less than a preponderance of evidence. No finding can be made that Applicant was sentenced to a jail term of more than one year based upon the evidence presented. Accordingly, the government has failed to meet its burden to establish that 10 U.S.C. § 986 applies in this case.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline G: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

SOR ¶ 2-Guideline J: For the Applicant

Subparagraph a: For 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 Applicant.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.
12. There is no assertion in subparagraph 1b that it was a jail sentence that was suspended.
13. Government Exhibit 7 indicates Applicant refused to submit to a breathalyser, so the term "BAC" cannot refer to what is commonly known as a "per se DWI", and the government did not submit any information indicating what the offense of BAC might otherwise be.

14. Because of the confused state of the record and the variances between what is alleged and the evidence submitted, I would have declined to take administrative notice if requested.