

DATE: May 7, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-27082

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

As a result of his excessive consumption of alcohol, Applicant was involved in several drunk driving incidents and an assault with a dangerous weapon. He has had financial problems since at least 1992 when he filed for Chapter 7 bankruptcy. He deliberately omitted from his security clearance application relevant information about his debts. Despite mitigating the criminal conduct and alcohol consumption personnel security guidelines, Applicant did not sufficiently mitigate the financial considerations and personal conduct guidelines. Clearance is denied.

**STATEMENT OF THE CASE**

Applicant, an employee of a defense contractor, applied for a security clearance. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant Applicant a clearance. In accordance with the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR) on 16 January 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the criminal conduct (Guideline J), alcohol consumption (Guideline G), financial considerations (Guideline F), and personal conduct (Guideline E) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 10 February 2003 and asked to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on 7 March 2003. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 18 March 2003 and responded on 14 April 2003. The case was assigned to me on 26 April 2003.

In the FORM, Department Counsel moved to amend an administrative error in the SOR by changing the reference in ¶ 4.a. from "1.g." to "3.g." Applicant did not object. The motion is granted.

## FINDINGS OF FACT

Applicant is a 39-year-old software engineer with a long history of alcohol abuse. Item 4 at 8, 9; Item 6 . From the time he was 16 or 17, Applicant drank to the point of intoxication most weekends. Item 6 at 1. In 1983, applicant was arrested for operating a motor vehicle in a manner to endanger lives and safety. Answer; Item 13. While attending college in October 1984, Applicant was arrested for operating a motor vehicle while intoxicated. Item 14 at 2; Item 6 at 2; Item 4 at 8.

After graduating from college, Applicant drank to the point of intoxication three to four nights a week. Item 6 at 2. A state criminal history records Applicant as having been arrested In November 1990 and again in January 1991 for operating a vehicle under the influence of alcohol. Item 13. Applicant divorced his wife in 1993 and cut back on his consumption of alcohol, although he still drank to the point of intoxication one to two times a month. Item 6 at 2. He knew he had an alcohol problem, and he abstained from consuming alcoholic beverages during the work week from June to September 1997. *Id.* He attended Alcoholics Anonymous (AA) meetings during this four-month period, but still drank to the point of intoxication one night each weekend. *Id.*

In September 1999, after an evening of drinking to the point of intoxication, Applicant and his girlfriend returned to his home. Applicant played music very loudly and, when his girlfriend complained, he said something about a gun and killing himself. Item 6 at 5; Item 17 at 3. Applicant then took a pistol and fired a shot from his back porch into the woods behind his house. Item 6 at 3. Applicant walked back into the house. He was depressed and angry with his girlfriend who was sleeping in the bedroom. Applicant put the gun to her head and said said, "Do you want to die?" Item 6 at 3. She grabbed the gun and, after a struggle, was able to wrench it from his grasp. Item 17 at 4. Applicant told her how to unload it and she did so. *Id.*; Item 6 at 3. She called the state police and Applicant went into the bathroom and tried to wash any gunpowder residue from his hands. *Id.* When the police arrived, he denied there was a gun or that anyone fired one. Item 6 at 4; Item 17. Applicant pled guilty to assault with a dangerous weapon and discharging a firearm within 500 feet of a building. The court accepted his pleas but continued the assault charge for a year and ordered probation on the discharging a firearm offense. Item 16. The assault with a dangerous weapon charge was subsequently dismissed. However, the court did require him to attend an inpatient alcohol detoxification program. Applicant completed the program. *See* Item 19. He has been alcohol free since September 1999. Item 6 at 6.

Applicant was married in 1991 and divorced in 1993. Item 4 at 10. He filed for bankruptcy in 1992 and claims that his wife was the cause of his financial difficulties. Response at 2. His excessive alcohol consumption contributed to his bankruptcy. Item 6 at 6. In January 1993, Applicant was discharged from all debts dischargeable under Chapter 7 of the Bankruptcy Act. Item 5. However, his education loan from the U.S. Department of Education was not discharged. *See* Item 5; 11 U.S.C. § 523(a)(8). One of the other debts alleged in the SOR (¶ 3.c.) appears to have been discharged in the 1992 bankruptcy. Item 5 at 19.

In 1998, while working for a previous employer, Applicant used his American Express Corporate Account for personal charges, even after he gave notice he was leaving the company, although he knew this was not permissible. Items 6 at 8; Items 11, 12. In accordance with its agreement with American Express, the company was forced to pay the amount Applicant was delinquent-some \$3,625.85. Item 11 at 4.

On his security clearance application, dated 8 December 1998, Applicant answered that he was not then currently over 90 days' delinquent on any debts (Question 39) and, during the last seven years, he had not been delinquent more than 180 days on any debts (Question 38). Item 4 at 14.

## 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 that 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. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

Applicant insists that he is a loyal U.S. citizen who would never do anything to jeopardize the security of this country. The decision to deny an individual a security clearance is not necessarily a determination of the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

### **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged under Guideline J that Applicant was charged in March 1983 with operating a motor vehicle to endanger (lives and safety) (¶ 1.a.); operating a vehicle while intoxicated in October 1984 (¶ 1.b.); operating a motor vehicle while under the influence of alcohol in November 1990 (¶ 1.c.); driving under the influence in January 1991 (¶ 1.d.); and assault with a dangerous weapon and discharge of a firearm in September 1999) (¶ 1.e.). Under Guideline J, a history or pattern of criminal activity is a security concern because it creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

Applicant has a history of criminal activity involving a serious offense (assault with a dangerous weapon, to which he pled guilty) and a series of less serious offenses. DC 2. The last known criminal activity occurred almost four years ago. There are two mitigating conditions that arguably apply to Applicant's case: The offenses were not recent (MC1) and Applicant has been rehabilitated (MC 6). The Appeal Board has declined to establish a bright-line rule on when a criminal act is recent. Instead, they have suggested that a totality of circumstances test is more appropriate. *See* ISCR Case No. 99-0018 at LEXIS \*10 (App. Bd. Apr. 11, 2000)

The evidence supports a finding that all of Applicant's offenses were committed after consuming excessive amounts of alcohol, Applicant is now sober, has been so since his arrest in 1999, and will likely stay that way in the future. Applicant admits his criminal behavior and has taken steps to stop it from recurring by giving up alcohol. Despite the lengthy record of offenses committed under the influence of alcohol, under the facts of this case, the offenses are not recent. C 1 and 6 apply. Based on all the circumstances of this case, the the mitigating conditions outweigh the disqualifying condition. Finding is for Applicant.

### **Guideline G-Alcohol Consumption**

In the SOR, DOHA alleged, under Guideline G, as evidence of Applicant's excessive alcohol consumption, his criminal conduct (¶ 2.a.), his admissions of excessive drinking from the age of 15 until September 1999 (¶ 2.b.); and his

admission that his abuse of alcohol may have contributed to his bankruptcy in 1992 (¶ 2.c.). Under Guideline G, the excessive consumption of alcohol is a security concern because it 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. Directive, ¶ E2.A7.1.1.

Applicant admits that he had a severe alcohol problem. He has a history of alcohol-related incidents away from work, such as the drunk driving and assault with a dangerous weapon offenses. DC 1. Applicant was a binge drinker who consumed alcohol until his judgment was impaired. DC 5. A judge ordered him into detoxification where he was diagnosed by a psychiatrist as being alcohol dependent. DC 3.

On the other hand, the last alcohol related incident was almost four years ago and there is no indication of a recent problem. MC 2. Applicant has made positive changes in his behavior supportive of sobriety. MC 3. Although forced upon him by the court, Applicant completed a substance abuse program. He continues to attend Alcoholics Anonymous three times a week, and has maintained a sober lifestyle. Finding is for Applicant.

### **Guideline F-Financial Considerations**

In the SOR, DOHA alleged under Guideline F that Applicant filed for Chapter 7 bankruptcy in 1992 (¶ 3.a.); owes the Department of Education approximately \$10,000 (¶ 3b.); has several debts outstanding (¶¶ 3.b.-f.); and owes a former employer for amounts charged to his corporate credit card (¶ 3.g.). Under Guideline F, an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive, ¶ E2.A6.1.1.

Applicant has a history of not meeting his financial obligations. DC 1. He has been unable or unwilling to satisfy his debts. DC 3. Applicant has suggested that the debts that caused his 1992 bankruptcy were beyond his control (MC 3) because they resulted from his wife's profligacy. Response at 2. Yet, he also notes that his drinking may have contributed to the problem. Item 6 at 6. I conclude that MC 3 does not apply to this case. Although the 1992 bankruptcy is not recent, the fact that it did not resolve Applicant's debt problems militates against applying MC 1.

Applicant claims his debt to the Department of Education was discharged in bankruptcy. Applicant listed the monthly payment for this debt in his bankruptcy, but there is no evidence in the record Applicant asked for this debt to be, or that it was, discharged. In fact, education loans from the Department of Education are not normally subject to discharge in bankruptcy. 11 U.S.C. § 523(a)(8).

Applicant admits that he failed to pay his American Express debt. Item 6 at 11. He claims that he did not pay the debt because the company still owed him salary for his last week of work. *Id.* But, rather than discuss it with the company, Applicant failed to respond to any of the registered letters his former employer sent him. Item 6 at 8. The company eventually sued Applicant for approximately \$3,600 and Applicant countersued for his back salary of about \$1,000. Item 12 at 3-4. The parties appear to have settled the case by dropping their claims. Response at 3. Even considering Applicant's claim to back pay, he still has not paid off the remaining \$2,000 he owed to his employer.

Although in September 2002 Applicant indicated a willingness to contact the alleged debtors and settle his debts (Item 5 at 5), he still has not done so. Thus, C 6 does not apply. Finding is against Applicant except for the debt alleged in ¶ 3.c., which was discharged by the 1992 bankruptcy.

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged under Guideline E that Applicant failed to pay off his overdue amounts on his corporate credit card (¶ 4.a.); provided false information to police officers after his arrest in 1999 (¶ 4.b.); and falsified his security clearance application by failing to correctly note that in the past seven years he had been more than 90 (¶ 4.c.) and 180 days' (¶ 4.d.) delinquent on his debts. (3) Under Guideline E, 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. Directive ¶ E2.A5.1.1.

Applicant's use of his corporate credit card for personal use and lying to police officers about the existence of a gun and whether a gun had been fired, shows a pattern of dishonesty and rule violations. DC 5. No mitigating conditions appear

to apply.

Applicant asserts that he did not deliberately omit his financial status from his security clearance application. He claims he had legitimate disputes over the existence of such debts and therefore was not required to report them as current on his security clearance application. Answer at 5-6. But, even with the ongoing dispute with his former employer, he admits that he knew he owed them money in excess of the amount he believed the company owed him. Therefore, he should have listed that debt. Furthermore, it is difficult to believe Applicant really thought his debt to the Department of Education had been discharged in bankruptcy. The loan is not listed in his bankruptcy as a debt, only as a \$100 per month payment on his expense sheet. Furthermore, he evidently failed to respond to any of the notices from the Department. If the debts had been discharged, a reasonable person would have contacted the Department and so informed them. Under these circumstances, I am convinced that his omission of this information from his security clearance application was deliberate. DC 2. The evidence does not support the applicability of any of the mitigating conditions. Finding is against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline G: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Paragraph 3. Guideline F: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: For Applicant

Subparagraph 3.d.: Against Applicant

Subparagraph 3.e.: Against Applicant

Subparagraph 3.f.: Against Applicant

Subparagraph 3.g.: Against Applicant

Paragraph 4. Guideline E: AGAINST APPLICANT

Subparagraph 4.a.: Against Applicant

Subparagraph 4.b.: Against Applicant

Subparagraph 4.c.: Against Applicant

Subparagraph 4.d.: Against Applicant

### **DECISION**

In light of all of 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.

**James A. Young**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Question 39 on the security clearance application asks whether an applicant is "currently over 90 days delinquent on any debt(s)?" not whether the applicant has been more than 90 days delinquent in the past seven years as the SOR states.