

DATE: March 15, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-01143

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

In November 1992, the Applicant was arrested and found guilty of Driving Under the Influence (DUI). In 1997 and 1999, he was arrested and fined for public intoxication. In 1995, he had been drinking before he was arrested for indecent exposure. The last incident occurred more than four years ago and there is no indication of a recent problem. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from his alcohol related arrests. Clearance is granted.

**STATEMENT OF THE CASE**

On January 16, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant stating DOHA could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) On February 14, 2003, the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On October 28, 2003, the Applicant received a complete copy of the file of relevant material (FORM) dated October 10, 2003, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant's response to the FORM was due on November 27, 2003. No response has been received. In the FORM, the Government presented 12 exhibits (Items). The case was assigned to me on December 22, 2003.

**FINDINGS OF FACT**

The SOR alleges alcohol consumption (Guideline G). The Applicant denies excessive alcohol consumption, denies he was guilty of public intoxication in 1999 and 1997, and denies he currently drinks to excess. He admits to the other allegations (SOR 1.c. and 1.d.). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

The Applicant is 32-years-old, has worked for a defense contractor since May 1995, and is seeking to maintain a security clearance.

In November 1992, the Applicant was arrested for driving under the influence (DUI) and fined \$1,128.00. The Applicant admits this occurred and acknowledges it was stupid behavior. In 1994, he received a secret clearance. In July 1995, he was arrested and fined for indecent exposure for swimming nude in a swimming pool. The Applicant and his date were playing volleyball in the apartment complex pool. They had been drinking before they returned to the apartment complex.

In April 1997, he was arrested and fined for public intoxication after falling asleep in a park. He had pulled into the park to eat his dinner and watch a thunderstorm. He had drunk beer prior his arrest, but his last beer was around 5:00 p.m. In September 1999, he was arrested and fined for public intoxication. He was drinking beer in a public park across the street from his apartment. The Applicant decided the easiest, most expedient solution to the situation was to pay the fine rather than contest the charge.

As of July 2001, the Applicant drank a six pack of beer during the week and occasionally a six pack on the weekend. As of February 2003, in his response to the SOR, the Applicant denies he drinks alcohol to excess, but does admit to having a beer with dinner.

### **POLICIES**

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Alcohol Consumption (Guideline G) 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. E2.A7.1.1.

Conditions that could raise a security concern and may be disqualifying include:

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. (E2.A7.1.2.1.)

Conditions that could mitigate security concerns include:

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

### **BURDEN OF PROOF**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

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. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

### CONCLUSIONS

The Government has satisfied its initial burden of proof under Alcohol Consumption (Guideline G). In November 1992, the Applicant was arrested and found guilty of DUI. In 1997 and 1999, he was arrested and fined for public intoxication. In 1995, he had been drinking before he was arrested for indecent exposure. Disqualifying condition 1<sup>(2)</sup> applies.

The Applicant's last arrest occurred in September 1999--more than four years ago. There is no indication of a current alcohol problem. In July 2001, the Applicant admitted he drank a six pack of beer during the week and occasionally a six pack on the weekend. The record is silent as to over what period of time the six pack of beer was consumed over the weekend. It could have been in a single day or over the two-day weekend. As of February 2003, the Applicant's drinking was limited to a beer with dinner. There is no showing the Applicant currently drinks to excess, has been intoxicated in the recent past, or been involved in criminal actions because of his drinking. Even though there were four alcohol related incidents over a seven-year period between 1992 and 1999, there is no showing of a current problem. Mitigating Condition 2<sup>(3)</sup> applies. I find for the Applicant as to SOR subparagraphs 1.a through 1.e.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

### FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Alcohol Consumption, Guideline G.: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the 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 a security clearance for the Applicant. Clearance is granted.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. 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. (E2.A7.1.2.1.)
3. MC 2. The problem occurred a number of years ago and there is no indication of a recent problem. (E2.A7.1.3.2.)