

DATE: October 2, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-03292

## **DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn A. Trowbridge, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant consumes eight to ten beers per sitting when socializing with friends on weekends, on occasion to intoxication. He does not believe his drinking has adversely affected his judgment or behavior. In December 2000, he was charged with spraying graffiti on the walls of a local high school, conduct which he admitted when arrested. Applicant did not disclose this arrest on his security clearance application because he feared loss of his job if he reported it. His lack of candor raises doubt about whether he possesses the requisite degree of good judgment, reliability, and trustworthiness to be granted access. His pattern of drinking to occasional intoxication is legal, but the Government must be assured that those with access do not drink to the point of significant impairment. Clearance is denied.

### **STATEMENT OF CASE**

On October 21, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant which detailed 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 the Applicant. [\(1\)](#) DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on alcohol consumption (Guideline G) and personal conduct (Guideline E).

A second copy of the SOR was remailed to Applicant on December 11, 2002. Applicant submitted an undated response, admitting the SOR allegations and requesting a decision based on the written record in lieu of a hearing. The Government submitted a File of Relevant Material (FORM) dated May 16, 2003, which was forwarded by letter dated May 19, 2003, to Applicant with instructions to submit additional information and/or any objections within thirty days of receipt. Applicant filed no response by the July 18, 2003, due date, and the case was assigned to me for a decision without a hearing on September 3, 2003.

### **FINDINGS OF FACT**

The SOR alleges under Guideline G consumption of eight to ten beers during a four-hour period on weekends, at times to intoxication, and one alcohol-related incident (spray painting graffiti on the walls of a local high school after drinking in December 2000), and under Guideline E, deliberate omission of his arrest from a June 2001 security clearance application. In his Answer, Applicant admitted the SOR allegations, including that he had falsified his SF 86 because he needed to support his family. Those admissions are accepted and incorporated as factual findings. After a thorough review and consideration of the evidence, I make the following additional findings of fact:

Applicant is a 24-year-old high school graduate who has been employed since mid-February 2001 as a security guard for a company providing protective services for the Department of Defense. He requires a secret security clearance for his duties.

The oldest of four children in his family, Applicant graduated from high school in June 1998. Unemployed until January 2000, he went to work as a security officer for a company providing security services to the federal government. In early December 2000, after drinking alcohol at a friend's home, Applicant and two friends went to the local high school where he and one companion spray painted graffiti on approximately 100 square feet of the school's walls. As they were driving away from the premises, they were stopped by a school district police officer who detected a strong smell of paint emanating from their vehicle. On noting paint on the school walls, the officer called the municipal police, and Applicant and one of his two companions were arrested on a charge of graffiti under \$500.00. After being advised of their rights, Applicant and his friend admitted spray painting the walls. A third companion was released as he had not exited their vehicle. Applicant was released on personal recognizance after being held in the county jail for 12 to 15 hours. Applicant submits, uncontroverted by the Government, that the charge was subsequently dismissed.

In mid-February 2001, Applicant commenced work for his current employer as a security guard. Needing a secret clearance for his duties, Applicant executed a security clearance application (SF 86) on June 4, 2001. An electronic version of the form was submitted to DISCO on June 7, 2001. Fearing loss of his job should he disclose his December 2000 arrest for spray painting graffiti on public property, Applicant responded negatively to question 26 on the SF 86 ["In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise 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."]. When Applicant executed the SF 86, he needed his job to help support his family, as although his parents were both working, their three incomes together were barely sufficient to pay the bills.

On December 5, 2001, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his December 2000 arrest and drinking pattern. Applicant admitted his arrest for spray painting graffiti "in the gym, mechanic shop, and classroom" at the high school gymnasium. He denied any personal involvement in the spray painting, and indicated the police would not believe he had not spray painted the graffiti because he had been drinking ("We had just gotten there when one of my friends went and got some spray paint out of his car. He spray painted graffiti in several places in the school but myself and the other individual were not involved." Item 5). Applicant indicated that pending his court date, he was required to report on a weekly basis to a probation officer until he was told the charges had been dropped due to insufficient evidence. With regard to his drinking, Applicant described social consumption on weekends of eight to ten 12-ounce beers over a four or five-hour period. He admitted becoming drunk on occasion, most of the time getting "a buzz." He expressed he does not have an alcohol problem and that alcohol has not adversely affected his judgment, behavior, or conduct. As for his failure to list his December 2000 arrest on his SF 86, Applicant stated:

I did not list this on my security questionnaire for several reasons, the first was that since I was not guilty of anything and they dropped the charges I did not feel that it needed to be listed. I was also afraid that if I listed this that I would be fired from my job. (Item 5).

Applicant values his job, as it pays well and does not require a higher education that he cannot afford. As of his Answer to the SOR, he and his mother were supporting the family, as his father was unable to work due to a back injury.

## **POLICIES**

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Sections 6.3 and E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to 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.

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

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.)

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

Conditions that could mitigate security concerns include:

The alcohol related incidents do not indicate a pattern (E2.A7.1.3.1.)

### **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.

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

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 (E2.A5.1.2.2.)

Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or

trustworthiness determination (E2.A5.1.2.3.)

Conditions that could mitigate security concerns include:

None

\* \* \*

Under Executive Order 10865 as amended and the Directive, a decision to grant or 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 common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the SOR. 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.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." 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.

### CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines G and E:

Nothing in Executive Order 10865, as amended, or Department of Defense Directive 5220.6 prohibits drinking per se. Rather, alcohol consumption raises security concerns under Guideline G when it is to excess. As of December 2001, Applicant was imbibing eight to ten beers per sitting on weekends when socializing with friends. Applicant admits he had been drinking before his arrest in December 2000 for spray painting graffiti on the walls of the local high school.<sup>(2)</sup> Although there is no evidence Applicant has ever allowed alcohol to negatively influence his work performance or attendance, those to whom classified information is entrusted must be relied on to safeguard this material both during business and non-business hours. The ingestion of alcohol to intoxication is incompatible with this duty due to the obvious potential for intentional or inadvertent disclosure when one is under the influence. Although the December 2000 incident is reflective more of immaturity than of an alcohol problem, disqualifying condition (DC) E2.A7.1.2.1. (alcohol-related incident away from work) must be considered on the basis of Applicant's admission to having been drinking prior to the incident. The more pertinent disqualifying condition is DC E2.A7.1.2.5. (habitual or binge consumption of alcohol to the point of impaired judgment), as Applicant has admitted to becoming intoxicated after drinking eight or ten beers. Nothing in the record indicates that Applicant has ever been diagnosed as an alcoholic, an alcohol abuser, or as alcohol dependent by any credentialed medical professional or licensed clinical social worker. His pattern of overindulgence in alcohol in itself raises significant Guideline G concerns.

A single alcohol-related incident that occurred in December 2000 is not sufficient to indicate a pattern (*see* mitigating condition E2.A7.1.3.31.). Yet doubts persist as to whether Applicant possesses the requisite good judgment, maturity,

and reliability to be entrusted with the safeguarding or handling of classified information given his drinking pattern. When interviewed by the DSS agent in December 2001, Applicant exhibited little insight into the affects of alcohol on one's judgment and conduct. Apprized through the SOR that his drinking habits are of concern to the Department of Defense, Applicant has not demonstrated a favorable change in his behavior. Based on the patterns of alcohol use of record, another alcohol-related incident cannot be ruled out. There is little or no evidence from which one can reasonably conclude that Applicant's overindulgence in alcohol is safely of the past. SOR subparagraphs 1.a. and 1.b. are resolved against him.

Moreover, Applicant's lack of candor about his December 2000 arrest raises personal conduct (Guideline E) concerns. Applicant deliberately falsified his response to question 26 on his June 2001 security clearance application because he feared loss of his job should he disclose his December 2000 misdemeanor arrest. DC E2.A5.1.2.2. (deliberate omission, concealment or falsification of relevant and material facts from any personnel security questionnaire) applies. As noted by Department Counsel in the FORM, lying to the Government to save one's job does not extenuate or mitigate deliberate falsification. Applicant clearly placed his personal interest and the needs of his family ahead of his responsibility to be candid with the Government. False statements cannot be justified on the basis of economic need, no matter how desperate. However, Applicant's motivation remains relevant, along with other factors such as the frequency and recency of the conduct, his age and maturity, and the presence of rehabilitation (regret for wrongdoing and efforts to correct the falsification), in determining whether he can be counted on to fulfill fiduciary obligations in the future.

The personal concerns are not mitigated under the Directive's adjudicative guidelines. When provided the opportunity to correct the record in a DSS interview, Applicant admitted he did not list his misdemeanor arrest on his SF 86. Yet he exhibited questionable candor with regard to his role in the December 2000 criminal incident. Applicant told the DSS agent he had not been personally involved in any of the spray painting, and when discussing the reasons why he omitted his arrest from his SF 86, Applicant responded, "I did not list this on my security questionnaire for several reasons, the first was that since I was not guilty of anything and they dropped the charges I did not feel that it needed to be listed." Applicant's denials of any culpability with regard to the spray painting are directly controverted by the arresting officer whose report indicates Applicant admitted that he had spray painted graffiti on the school. In the absence of any evidence to corroborate his claims of no culpability, serious doubts persist as to whether his representations can be relied on. Deliberately providing false or misleading information concerning relevant and material matters to an investigator is conduct raising personal conduct issues in its own right (*see* E2.A5.1.2.3.). SOR subparagraph 2.a. is also resolved against him, Applicant having failed to meet his burden of proving reform.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline G: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. 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 Applicant.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. The SOR was issued pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. The degree of his impairment on that occasion is not clear. There is nothing in the arresting officer's report that indicates Applicant exhibited any signs of alcohol abuse. Applicant told a DSS agent that he had been drinking before the incident.