

DATE: September 30, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-03629

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Catherine M. Engstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Twenty-two-year old Applicant admits four alcohol-related arrests between 1999 and 2001. On his security clearance application he falsely characterized the 1999 arrest and he failed to list several jobs he had held. He was fired from two of the jobs he did not list for failure to report to work timely. Applicant continues to drink alcohol. Clearance is denied.

**STATEMENT OF THE CASE**

On March 10, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In the SOR the Government alleged that Applicant was disqualified from obtaining a security clearance because of criminal activity (Guideline J), alcohol consumption (Guideline G), and personal conduct (Guideline E). In a sworn statement dated April 3, 2003, Applicant responded to the SOR and requested a hearing. The case was initially assigned to Judge Roger Willmeth, but due to caseload considerations, was subsequently assigned to me on May 19, 2003. A Notice of Hearing was issued on May 22, 2003, and I held a hearing in this matter on June 10, 2003. During the course of the hearing the Government presented 11 exhibits (Ex.), and Applicant presented 6 exhibits and one witness. The transcript (Tr. ) was received June 18, 2003.

**FINDINGS OF FACT**

The SOR in this case contains 17 allegations of disqualifying conduct. Five allegations relate to conduct charged under Guideline J, Criminal Conduct. Four allegations relate to conduct charged under Guideline G, Alcohol Consumption. Eight allegations relate to conduct charged under Guideline E, Personal Conduct. In his answer, Applicant admitted

additional Guideline J conduct which had occurred in November 2001, but which was not included in the SOR.

Applicant admitted the factual allegations as set forth in subparagraphs 1.a., 1.b., 1.c., 1.d., and 1.e of the SOR, involving Criminal Conduct under Guideline J. He admitted the factual allegations as set forth in subparagraphs 2.a. and 2.b. and denied the allegations set forth in subparagraphs 2.c. and 2.d. of the SOR, involving Alcohol Consumption under Guideline G. He admitted the factual allegations as set forth in subparagraphs 3.a., 3.b., 3.d., 3.e., 3.f., and 3.g., involving Personal Conduct under Guideline E. He neither admitted nor denied the allegations in subparagraph 3.c., and he denied the allegations in subparagraph 3.h., involving Guideline E disqualifying conduct. Applicant's admissions are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant, who is 22 years old, is employed as a facility administrator by a Government contractor. He is unmarried and contributes, by court order, to the support of a four-year-old daughter. He is current on his child support and owes no arrearage. Applicant has a series of arrests for unlawful behavior. In May 1999, he was arrested and found guilty of reckless driving. He was arrested for driving under the influence of alcohol in June 1999, in June 2000, and in November 2001. In March 2001, he was arrested and charged with the possession of a false identity card in order to obtain alcoholic beverages. After his arrest for driving under the influence in November 2001, Applicant was ordered by the court to undertake a 17-week counseling program for substance abuse and to attend two Alcoholics Anonymous meetings per week. His driver's license was suspended for a year. (Tr. 39, 41.) Applicant presented no documentation that he had completed the counseling course. (Tr. 43.)

Applicant began drinking alcohol at approximately 16 years of age. His abuse of alcohol resulted in the alcohol-related arrests detailed above. In September 2000, he was counseled by his employer for tardiness and for arriving at his workplace smelling of alcohol. He asserts that he is an occasional social drinker and estimates that he may consume between one and four alcoholic drinks at an after-work happy hour. (Tr. 44.) He further states that he is not an alcoholic and does not have an alcohol abuse problem. (Tr. 47.) He says he intends to continue drinking. (Tr. 50.)

He provided no evidence of his current drinking patterns to rebut the Government's allegations in subparagraphs 2.c. and 2.d. of the SOR. His testimony was vague regarding how much he now drinks and how often he drinks. I found his testimony evasive and lacking in credibility when he responded to questions about the frequency and amount of his current alcohol consumption. (Tr.44-46.)

Applicant has a history of reckless and irresponsible behavior. In June 1999, while under the influence of alcohol, he struck a pedestrian with his automobile in a parking lot. In May 2001, the pedestrian filed a motion for judgment in the amount of \$50,000 against Applicant for compensatory and punitive damages. (Ex. 11.) Applicant was fired from two jobs for failing to report to work. (Tr. 21-25.) In high school he was involved in fights after drinking and was required to undergo anger management training. (Tr. 50.) When, by court order, his driver's license was suspended for driving under the influence, Applicant violated that order and drove to his job at least one time. (Tr. 55-56.) His behavior led one of his supervisors to advise him to seek counseling from the company's human resources department. (Tr. 56; Ex. 6.)

On July 12, 2000, Applicant completed a Security Clearance Application (SF-86). Item 6 on the SF-86 is identified as "Your Employment Activities." He listed three employers in response to Item 6. The first employer identified was his current employer; where he said he had worked from March 2000 to the present. He identified a second employer and listed the period September 1999 to March 2000 for his period of employment, and he identified a third employer and listed the period between July 1996 and September 1999 as his period of employment.

In a signed sworn statement dated August 30, 2001, Applicant stated that he had not listed several other employers at Item 6 on his SF-86 because he had worked at these jobs for short periods of time or he had forgotten them. He identified five other employers he had worked for which were not listed on his SF-86, and he stated that he was fired from two jobs he did not list in Item 6 of his SF-86. He answered "no" to question 20 of his SF-86, which asks, in pertinent part, that an applicant tell whether he has been fired from a job in the past 10 years.

Question 24 on the SF-86 requests that an applicant tell whether he or she has ever been charged with or convicted of

any offense(s) related to alcohol or drugs. In response, Applicant identified only one such arrest: for driving under the influence in 2000, and he then responded to Question 26, which reads as follows:

#### Your Police Record - Other Offenses

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.

In response to Question 26, Applicant listed his arrest in June of 1999, which he identified on the SF-86 as a reckless driving charge. The record shows that Applicant was initially charged with driving under the influence in June 1999, and the charge was later reduced to reckless driving. He did not list his arrest for reckless driving in May 1999 on his SF-86.

Applicant was interviewed twice by a special agent of the Defense Security Service, once in June 2001 <sup>(1)</sup> and once in August 2001. In a sworn, signed statement following his June 2001 interview with the agent, he admitted the June 1999 and June 2000 arrests for driving under the influence and stated that he had no other alcohol-related offenses and no other adverse involvement with the police. He did not admit to the reckless driving charge in May 1999 or to the March 2001 arrest for using a false identification for the purpose of obtaining alcohol. In a signed sworn statement to a special agent of the Defense Security Service, dated August 30, 2001, Applicant acknowledged the May 1999 arrest for reckless driving and the arrest in March 2001 for using a false identification card for the purchase of alcohol. In his signed sworn statement of August 2001, he admitted that he had falsified a material fact in his signed sworn statement of June 2001 when he told the interviewing agent that he no longer associated with drug users, when, in fact, in August 2001, he was associating with people who used drugs.

### POLICIES

"[No] 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 the 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.

Paragraph E2.2.1 of Enclosure 2 to the Directive provides adjudicative guidelines for determining eligibility for access to classified information and defines the adjudicative process as "the careful weighing of a number of variables known as the whole person concept." In following this policy precept, adjudicators must examine a sufficient period of a person's life to determine whether the individual is eligible for a security clearance and they should consider available and reliable past and present information about the applicant that is both favorable and unfavorable. In evaluating the relevance of an individual's conduct, the adjudicator should 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, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The relevant revised adjudication guidelines pertaining to the instant case are Guideline J: Criminal Conduct, Guideline G, Alcohol Consumption, and Guideline E, Personal Conduct. Guideline J reads, in pertinent part, as follows:

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses;

Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.2. The crime was an isolated incident;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

Guideline G, Alcohol Consumption, is concerned with excessive alcohol consumption which 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.

The following conditions could raise a security concern in this matter and could be disqualifying:

E2.A7.1.2.1: Alcohol-related incidents away from work, such as driving while under the influence; and

E2.A7.1.2.2. Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition;

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

Guideline G identifies conditions that could mitigate security concerns deriving from excessive alcohol consumption. Mitigating conditions that might be relevant in the instant case are:

E2.A7.1.3.1. The alcohol-related incidents do not indicate a pattern;

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

E2.A7.1.3.3. Positive changes in behavior supportive of sobriety.

The security issues identified under Guideline E which apply to the facts of this case are 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 security concerns and may be disqualifying are:

E2.A5.1.1.2. Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness investigation.

E2.A5.1.2.2. 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;

E2.A5.1.2.3. 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.A5.1.2.5. A pattern of dishonesty or rule violations... .

E2.A5.1.2.6. Association with persons involved in criminal activity.

In this case, the following conditions could mitigate security concerns:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

Under the Directive, a decision to grant or to 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 commonsense determination required, the administrative judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. *See* Directive, 5 and 6.

### **Burden of Proof**

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. 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 applicant's 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 nevertheless security worthy. The U.S. Supreme Court has held that the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan, supra*, at 531.

### **CONCLUSIONS**

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to each allegation set forth in the SOR:

The security concern under Guideline J is that an individual's history or pattern of criminal activity raise doubts about his judgment, reliability and trustworthiness. Allegations set forth in Subparagraphs 1.a., 1.b., 1.d., and 1.e. of the SOR and admitted by the Applicant raise a concern under Guideline J that Applicant lacks sufficient judgment, reliability, and trustworthiness to be entrusted with classified material. Applicant's admissions of his convictions of reckless driving, driving under the influence of alcohol, and possession of a false identification for obtaining alcoholic beverages bring his conduct under disqualifying conditions E2.A10.1.2.1 and E2.A10.1.2.2. Conditions that could mitigate the disqualifying conditions under Guideline J do not apply to the facts of Applicant's case. His criminal behavior is recent (E2.A10.1.3.1); his crimes are numerous and not isolated (E2.A10.1.3.2); and there is no clear evidence in the record of rehabilitation. (E2.A10.1.3.6). Thus, on the four allegations alleging criminal conduct under Guideline J, I find against

the Applicant.

Subparagraph 1.c. of the SOR is not an allegation of disqualifying behavior under Guideline J. Applicant admits the facts recited in subparagraph 1.c. and points out that he identified the court-ordered alcohol counseling in response to Question 30 on the SF-86 he completed on July 12, 2000. On his SF-86 he identifies the counselor he was assigned to and the period of counseling as October 18, 1999 to January 3, 2000. Applicant's answer to the SOR states that in November 2001 he was charged with driving under the influence of alcohol and was subsequently ordered to attend a 17-week counseling course and a 5-week alcohol awareness course. He stated further that his driver's license was restricted for one year, and that he received permission to drive again in April 2003. While Applicant attested that he completed the second course, he presented no documentation to indicate the counselor's assessment of his prognosis or that he completed either course. (Tr. 39-43)-(2) I find for the Applicant on allegation 1.c., since the facts charged and admitted do not constitute a disqualifying condition under Guideline J.

The Government's concern, under Guideline G, is that excessive alcohol consumption results in impaired judgment, unreliability, and failure to control impulses. Excessive alcohol consumption increases the risk of unauthorized disclosure of classified information due to carelessness.

Applicant has been a drinker of alcohol for nearly all of his adolescent and young adult life. He admits to alcohol-related incidents away from work, such as driving under the influence, thus raising a disqualifying security concern under E2.A7.1.2.1. He also admits to alcohol related incidents at work, such as being counseled by his supervisor for arriving for work late and smelling of alcohol, a disqualifying security concern under E2.A7.1.2.2. Although Applicant has not been diagnosed as an alcoholic or as alcohol dependent, his habitual consumption of alcohol has led to impaired judgment, a disqualifying condition under E2.A7.1.2.5. While Applicant denies excessive use of alcohol or impairment of his abilities as the result of his alcohol use, his public conduct as a driver and the observations of his supervisor argue otherwise. Twice he has been ordered by a court to attend substance abuse and alcohol counseling programs. Despite these warning signals, Applicant has not sought an evaluation of his alcohol use by a credentialed medical professional.

Applicant has put forward no facts which would mitigate the Guideline G security concerns. Applicant's conduct which resulted in the alcohol related episodes away from work and in the workplace occurred recently and suggest a pattern of excessive alcohol consumption resulting in impaired judgment and unreliability. While Applicant argues that he has changed, he continues to drink after participating in court-ordered substance abuse counseling and mandatory attendance at Alcoholics Anonymous meetings. He offers no persuasive evidence of positive behavioral changes that would make similar alcohol-related episodes in the future unlikely. *See* Guideline G, ¶¶ E2.A7.1.3.1, E2.A7.1.3.2; E2.A7.1.3.3. Accordingly, allegations in subparagraphs 2.a. through 2.d. of the SOR are concluded against Applicant.

The security concern under Guideline E, Personal Conduct, is with conduct or behavior which demonstrates questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty or unwillingness to comply with rules and regulations. Individuals who exhibit such conduct may not possess the personal qualities required to properly safeguard classified information.

Applicant's admissions regarding the Personal Conduct allegations in the SOR provide evidence of behavior that raises security concerns under Paragraph E2.A5.1.1 of Guideline E of the Directive. His falsification of material facts, lack of candor, and refusal to provide full, frank, and truthful answers to a special agent of the Defense Security Service as alleged in subparagraph 3.h. of the SOR and in his answers to Questions 6 and 24 of his SF-86, as alleged in subparagraphs 3.f and 3.g. of the SOR, are evidence of disqualifying conduct under Guideline E, ¶¶ E2.A5.1.1.2, E2.A5.1.2.2, E2.A5.1.2.3, E2.A5.1.2.6. Applicant's admitted conduct as identified in SOR allegations 3.b., 3.c., 3.d, and 3.e. is disqualifying under Guideline E, ¶E2.A.5.1.2.5.

Four mitigating conditions under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated under E2.A.5.1.3.1 if the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. However, because the information was substantiated and was pertinent to a determination of the Applicant's judgment, trustworthiness or reliability, mitigating condition E2.A5.1.3.1 does not apply to the facts of his case. Mitigating condition E2.A5.1.3.2 also is inapplicable, for his falsifications were recent, were not isolated incidents, and he did not provide correct information voluntarily.

Mitigating conditions E2.A5.1.3.3 and E2.A5.1.3.7 are also inapplicable, since Applicant did not make prompt good faith efforts to correct the falsification before being confronted with the facts, and, as to the allegation in subparagraph 3.h. of the SOR, he gave no persuasive evidence to demonstrate that his association with persons involved in criminal activities has ceased. Accordingly, the allegations in subparagraphs 3.b., 3.c., 3.d., 3.e., 3.f., 3.g., and 3.h. of the SOR are concluded against the Applicant.

Applicant provided persuasive evidence to mitigate the allegation in subparagraph 3.a. of the SOR that he was delinquent or in arrears in his child support payments, which, if established, would have been a disqualifying condition showing a disregard for a court-ordered obligation or rule under ¶E2.A5.1.2.5. Since the allegation was not substantiated, mitigating factor E2.A5.1.3.1 applies to the facts alleged, and I find for Applicant as to subparagraph 3.a. of the SOR.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of evidence and under all of the Directive guidelines that were generally applicable or might be applicable to the facts of the case. Under the whole person concept, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance.

### **FORMAL FINDINGS**

Formal findings For or Against 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, Criminal Conduct (Guideline J): **AGAINST THE APPLICANT**

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2, Alcohol Consumption (Guideline G): **AGAINST THE APPLICANT**

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Paragraph 3, Personal Conduct (Guideline E): **AGAINST THE APPLICANT**

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: 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 the Applicant. Clearance is denied.

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Joan Caton Anthony

Administrative Judge

1. The SOR inaccurately identified the date of Applicant's first signed, sworn statement as July 12, 2001.
2. This information will be considered in my discussion of Guideline G allegations in the SOR.