

DATE: July 28, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-30809

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

**FOR GOVERNMENT**

Kathryn A. Trowbridge, Department Counsel

**FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of excessive drinking during his high school years and beyond (to at least June 2002) and five alcohol-related offenses over a period of time that stretches from August 1997 to December 2000. With no documented recurrence of abusive drinking since June 2002, Applicant mitigates the government's security concerns over his drinking excesses and alcohol-related offenses. However, Applicant's concealment of four of his alcohol-related offenses in his executed security clearance application is not mitigated under any of the pertinent mitigation guidelines covered by Guideline E and raises continuing security concerns about Applicant's judgment and reliability. Criminal implications of his omissions are mitigated under the separate mitigation conditions governed by Guideline J. Clearance is denied.

### **STATEMENT OF CASE**

On May 26, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on June 21, 2005 and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on August 31, 2004, and is credited with receiving it on September 7, 2004. Applicant did not respond to the FORM within the 30 days provided him. The case was assigned to me on November 8, 2004.

### **SUMMARY OF PLEADINGS**

Under Guideline G, Applicant is alleged to have (1) consumed alcohol with varying frequency, at times to excess and to the point of intoxication, from about 1997 to at least June 2002, and (2) been arrested and charged on five separate

occasions between August 1997 and December 2000 in connection with alcohol-related offenses.

Under Guideline E, Applicant is alleged to have falsified his security clearance application (SF-86) of June 2001 by omitting four of his alcohol-related arrests/charges. Under Guideline J, the allegations made under Guideline E are incorporated by reference.

For his response to the SOR, Applicant admitted his excessive drinking and alcohol-related arrests/charges but denied falsifying his SF-86. Applicant claimed a misunderstanding of the question covering alcohol-related offenses and forgetfulness.

### **FINDINGS OF FACT**

Applicant is a 25-year-old parts control specialist for a defense contractors who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

As a high school student Applicant drank excessively at party functions, sometimes to the point of intoxication, and continued his excessive drinking (off and on) for several years after graduating. Between 1997 and 2000, he was involved in five separate alcohol-related incidents. Specifically, in August 1997 he was arrested for public intoxication, found guilty and fined \$250.00. He was arrested again for public intoxication in January 1998 (found guilty and fined \$450.00) and in March 1999 (found guilty and fined \$350.00).

In October 2000, Applicant was arrested for driving under the influence (DuI) and was ordered to pay a \$1,000.00 bond and complete a pre-trial diversion program, which he did. And in December 2000, he was charged with furnishing alcohol to a minor. A warrant was issued for his arrest on this charge in January 2002. It is unclear how Applicant responded to the issued warrant and the arrest charges.

To what extent Applicant continues to consume alcohol is not clear from the record. In a June 2002 signed, sworn statement he gave to a DSS interviewer he assured he had talked to a counselor to ensure he did not have a drinking problem, but provides no specifics as to the advice he received and what he has been doing to avoid recurrent incidents.

In an SF-86 he completed in June 2001, Applicant listed his 1998 public intoxication arrest when responding to question 24, but omitted his other alcohol-related offenses. He attributes his omissions of his remaining four arrests to memory lapse on his omitted convictions and not understanding the question's coverage of charges as well as convictions (*see* Applicant's response). Question 24, however, is very clear about asking for information pertaining to arrests and charges. Applicant doesn't provide very much information as to how he could have both forgotten about two of his convictions and failed to list his arrests/charges in the remaining ones (some of which occurred more recently than the 1998 arrest). Without more documentation in this administrative record to gauge Applicant's intentions, he cannot avert inferences that his omissions were knowing and wilful. While Applicant did acknowledge his omitted offenses when interviewed by a DSS agent two years later, his signed, sworn statement indicated he did so only after being confronted with the incidents (*see ex. 9*).

### **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2

of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

## **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.

## **Personal Conduct**

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

## **Criminal Conduct**

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

## **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## **CONCLUSIONS**

Applicant is a parts control specialist who drank to excess and committed five alcohol-related offenses between 1997 and 2000. His five offenses reflect alcohol abuse by Applicant and documented proof of his having a recurring problem with alcohol through at least June 2002. Never diagnosed as an abusive drinker or alcohol dependent, Applicant, nonetheless, drank excessively while in social situations in high school and as a young adult. There is no record, however, of his being involved in an alcohol-related offense since December 2000, a period of almost four years, or drinking excessively since June 2002.

Since June 2002, there are no clear indications of whether Applicant has stopped abusing alcohol. While he claims to have matured and stopped abusing alcohol, he provides no documentation from which to gauge assurances. Still, potential abuse predictions, generally, may not be based on supposition or suspicion. *See* ISCR Case No. 01-26893 (October 2002); ISCR Case No. 97-0356 (April 1998). The Appeal Board has consistently held that an unfavorable credibility determination concerning an applicant is not a substitute for record evidence that the applicant used marijuana since his last recorded use, or based on his past use is likely to resume usage in the future. *See* ISCR Case No. 02-08032 (May 2004). Based on the lack of any evidence he has abused alcohol since June 2002, Applicant may invoke E2.A7.1.3.2 (*The problem occurred a number of years ago and there is no indication of a recent problem*) and

E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*). While Applicant's recurrent alcohol abuse over four plus years raises some questions over the strength of his avoidance assurances, it is not enough to prevent Applicant's successful mitigation of the issue.

Applicant's manifest avoidance of any further incidents of alcohol abuse or excessive drinking over the past two plus years represents important restorative action on his part and is encouraging.

Assessment of Applicant's alcohol-related conduct must be made on the basis of a review of the entire evidentiary record developed to date, not merely the information developed with respect to his identified six characterized alcohol-related offenses. In making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most recent drinking history, his lack of any probative recurrent alcohol-related problems in or outside the work place over the past four plus years, and the adequacy of the time elapsed since his last abuse of alcohol (*i.e.*, in June 2002) in the face of his corroborated commitment to avert alcohol-related incidents in the future.

All in all, Applicant's mitigation efforts to date reflect both increased understanding about alcohol abuse, sustained efforts to control his drinking and stated motivational reasons to avert abusive drinking in the future. His avoidance of any additional alcohol-related incidents and abusive drinking over the past two plus years reflects considerable judgment restoration.

Considering the record as a whole, Applicant makes a sufficient showing that he has gained the maturity to avert any recurrent problems with judgment lapses related to alcohol to warrant safe predictions that he is no longer at risk to judgment impairment associated with such conduct. Favorable conclusions warrant with respect to the alcohol-related allegations covered by sub-paragraphs 1.a through 1.f of Guideline G.

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E, too, as the result of his omissions of his four alcohol-related arrests in the SF-86 he completed in June 2001. By omitting his alcohol-related arrests and convictions (in two of the cases), Applicant failed to furnish materially important background information about his alcohol history that was needed for the Government to properly process and evaluate his security clearance application. Appellant's omissions are covered by Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: specifically, E2.A5.2.2 (*The deliberate omission, concealment, falsification or misrepresentation 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*).

Applicant's omissions are not shown to have been mitigated through prompt, good faith corrections and are not covered by any of the mitigating conditions of the Guidelines for criminal conduct. Considering all of the evidence produced in this record, unfavorable conclusions warrant with respect to the allegations covered by Guideline E (personal conduct).

That none of Applicant's SF-86 omissions resulted in formal charges and adjudication against Applicant does not mean that the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. The Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Accordingly, two of the disqualifying conditions of the Adjudication Guidelines for criminal conduct may be invoked: E2.A10.1.2.1 (*Criminal conduct regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*).

Unlike Guideline E-covered omissions, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate its related falsification parameters under 18 U.S.C. Section 1001.

Applicant's belated coming forward with his full disclosure of his four additional alcohol-related arrests and convictions in his DSS interview represented a positive shift in his attitude about withholding drug involvement information that he had long felt could imperil his job and clearance if disclosed. From the record, his omissions appear to be isolated to his responses to a single security clearance application and involve incidents of his youth. His corrections under the circumstances are enough to meet the mitigation requirement of evidenced clear rehabilitation to entitle him to apply

MC E2.A10.3.6 (*There is clear evidence of successful rehabilitation*) of the Guidelines for criminal conduct. Based on a full review of the evidence and drawn inferences from the developed record, favorable conclusions warrant with respect to subparagraph 3.a of Guideline J.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E 2.2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE G (ALCOHOL): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: FOR 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge