

DATE: January 29, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-19852

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Deputy Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of alcohol-related arrests and convictions (five in all) over a 14-year period spanning 1984 and June 1998. His drinking never resulted in any professional assessment of alcohol abuse or dependence but did manifest recurrent alcohol abuse out of the work-place. Since May 2002, however, he has adhered to a self-imposed abstinence regimen, influenced not only by concerns about his security clearance, but a recognized need for a lifestyle change that did not include alcohol. Finding no evidence of alcohol dependence (past or present), his substance abuse counselor prescribed no treatment for him. Applicant fully mitigates security concerns relative to both his past abuse of alcohol and any judgment and reliability concerns arising from both his SF-86 arrest omissions and his receipt of two traffic-related citations are mitigated as well. Clearance is granted.

### **STATEMENT OF THE CASE**

On July 2, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 Applicant, and recommended referral to an Administrative Judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on July 9, 2003, and requested a hearing. The case was assigned to me on September 5, 2003. Pursuant to notice, a hearing was convened on November 6, 2003, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of six exhibits; Applicant relied on four witnesses (including himself) and three exhibits. The transcript (R.T.) of the proceedings was received on November 20, 2003.

### **SUMMARY OF PLEADINGS**

Under Guideline G, Applicant is alleged to have (a) consumed alcohol, at times to excess and to the point of intoxication, to include black outs and grayouts, from about 1984 to at least April 2002, (b) been arrested in 1986 for DuI after being involved in an accident and giving a Breathalyzer test (charge later dismissed after death of arresting officer in line of duty), (c) been arrested in August 1991 for DuI and failure to drive in a single lane, found guilty of driving while alcohol impaired, and ordered to serve time in jail (credited for time served), fined and awarded community service and probation, (d) arrested for DuI and speeding in June 1993, to which he pleaded guilty to DuI and was sentenced to 30 days, ordered to attend a Level II program and received 40 hours of alcohol treatment or rational recovery, placed on two years probation and ordered to take antabuse treatment for the duration of his probation, and (e) was arrested in June 1998 for DuI, speeding and driving on a revoked license, to which he pleaded guilty to DuI and was sentenced to 75 days in jail through a community corrections release program, awarded 12 months probation, fined, ordered to complete a Level II alcohol education course and accept 42 hours of alcohol treatment therapy, attend 6 months of rational recovery sessions and perform 48 hours of useful public service.

Under Guideline E, Applicant is alleged to have (a) falsified his March 19, 2000 SF-86 by omitting his 1986 and 1991 DuI arrests, (b) been arrested in February 1996 for failure to appear (found not guilty) and in June 1997 for operating a motor vehicle without compulsory insurance and a driver's license (amended to substitute failure to present proof of insurance and driving on a restrained and invalid license, and speeding, to which he pleaded guilty to driving without a license and was sentenced to 12 months of unsupervised deferred sentence, fined and ordered to perform 100 hours of useful public service.

For his response to the SOR, Applicant admitted most of the allegations. He denied only an intention to falsify his SF-86. In explanation, he claimed he does not behave in this manner anymore and has not had a DuI offense in the five years that have elapsed since his last DuI.

### **PROCEDURAL ISSUES**

Before the close of the hearing, Department Counsel moved to amend the SOR as follows: (a) to substitute the date of March 19, 2002 for March 19, 2000 in subparagraph 2.a and (b) delete subparagraph 2.b as a mistake. There being no objection to Department Counsel's amendment requests and good cause being shown, Department Counsel's motion was granted. Applicant's answer remained unchanged as the result of the amendments.

### **FINDINGS OF FACT**

Applicant is 34-year-old software engineer for a defense contractor 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.

Between 1984 and 1998, Applicant consumed alcohol on an average of twice weekly. He estimates to have drunk between 8 and 12 twelve-ounce beers at each sitting (usually about once a week between 1991 and 1998) and developed a high tolerance for alcohol. Despite drinking to the level of intoxication on numerous occasions, he never felt he had an alcohol problem. The six month rational recovery program he attended in 1993 in compliance the court's conditions, while helpful to him in better understanding alcohol abuse did nothing to instill any sense he had any physical or psychological problems with alcohol that required addressing (*see* R.T., at 65-67).

Following his last alcohol-related incident in June 1998, Applicant reduced his alcohol intake considerably: to 2 to 3 beers monthly. Without any expressed concerns about his drinking from any of his family or work colleagues during this period of rather intense drinking (*i.e.*, between 1984 and 1998), he saw no reason to change his drinking practice. As a result, he never consulted an alcohol abuse counselor or contemplated cutting back in his drinking. However, he picked up his drinking some in 2001, occasionally (every two months) consuming enough beers to make him intoxicated (*see* R.T., at 76).

After completing his DSS interview in April 2002, Applicant came to realize he might have an alcohol problem (*see* R.T., at 70-71) that could jeopardize his security clearance. Applicant credits the DSS agent with helping him to conclude he needed a lifestyle change that was incompatible with his continued drinking (*see* R.T., at 61, 72-74). So, in May 2002, he began abstaining from alcohol altogether. Later (in October 2003) he consulted with a licensed substance

abuse counselor (Mr. A) to verify whether or not he had an alcohol problem he should be concerned about. Mr. A's October 2003 evaluation consisted of a clinical interview and the administration of three clinically based instruments (SASSI, alcohol use profile and a short alcohol dependence data questionnaire). Mr. A noted Applicant's sustained abstinence since May 2002 and commitment to continue with his abstinence (*see ex. A*). Based on the questionnaire completed by Applicant, Mr. A could find no evidence of dependence on alcohol or marijuana. Noting Applicant's lack of any alcohol-related incidents in the previous five years, and his commitment to abstinence over the previous 17 months, Mr. A prescribed no alcohol or drug-related treatment for him.

Since his last DuI arrest and conviction in June 1998, Applicant has encountered no problems with law enforcement of any kind, save for a minor traffic violation earlier this year (reduced to unsafe vehicle charge) and continues to abstain from drinking (some 18 months now). His supervisor has detected no drinking by Applicant and credits him with being conscientious and responsible.

Asked to complete an SF-86 in March 2002, Applicant omitted his 1986 and 1991 DuI arrests. He attributes his omissions to the advice he received from his senior group assistant (who he identified by name after expressing privacy concerns) when he filled out an earlier SF-86 in February 1999 (*i.e.*, to go back 7 years when listing prior alcohol-related offenses (*see ex. C*; R.T., at 53-55)). He now realizes he was mistaken in his assumption and should have returned to his senior group assistant for follow-up advice before completing his March 2002 SF-86. Question 24 of his March 2002 SF-86 contains no 7-year limitation and is clear in what it asked Applicant to address: all of his prior alcohol-related arrests and convictions.

Applicant, however, listed both his 1993 and 1998 offenses when answering question 24 (which is consistent with his 7-year scope claims of understanding) and noted his earlier 1986 and 1991 offenses without being confronted when asked about his past alcohol-related offenses in an ensuing April 2002 DSS interview (*see ex. 2*; R.T., at 40-41). Applicant is corroborated in his candor assurances by the interviewing DSS agent who testified in his behalf (*see R.T.*, at 43). So, while Applicant's failure to check back with his FSO re: the scope of question 24 surely reflected judgment indiscretion on Applicant's part, his SF-86 omissions do not warrant inferences of knowing and wilful concealment.

## **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.

#### **Disqualifying Conditions:**

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.

DC 5 Habitual or binge consumption of alcohol to the point of impaired judgment.

#### **Mitigating Conditions:**

MC 2 The problem occurred a number fo years ago and there is no indication of a recent problem.

MC 3 Positive changes in behavior supportive of sobriety.

### **Personal Conduct**

*The Concern:* 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.

#### **Disqualifying Conditions:**

DC 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.

DC 5 A pattern of dishonesty or rule violations.

#### **Mitigating conditions:**

MC 3 The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

MC 4 Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.

### **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.

### **CONCLUSION**

Applicant presents as a software engineer specialist for a defense contractor with over four years of holding a security clearance with his current employer. His five alcohol-related incidents over a 14-year time span reflect alcohol abuse by Applicant and documented proof of his having a recurring problem with alcohol through June 1998 (when he was last involved in any alcohol-related incident). Never diagnosed as an abusive drinker or alcohol dependent, Applicant, nonetheless, occasionally drank excessively while in social situations.

Having continued on with his drinking following his last two alcohol-related incidents (in 1993 and 1998), Applicant

manifested some denial of any potential alcohol problems associated with his drinking. On the strength of the evidence presented, one disqualifying condition (DC) of the Adjudication Guidelines for alcohol consumption may be applied: DC 1 (alcohol-related incidents away from work) and DC 5 (habitual or binge consumption of alcohol)..

Following his 1998 DuI conviction, Applicant cut back considerably in his drinking to 2 to 3 beers a month, but continued to drink in the belief he didn't have an alcohol problem. Four years later, following his April 2002 DSS interview, he became convinced he might have an alcohol problem and quit drinking altogether. He has continued to embrace his chosen path of abstinence and credibly claims over 18 months of sustained abstinence.

Seeking assurances he didn't have an alcohol problem, Applicant consulted with Mr. A (a licensed substance abuse counselor) in October 2003. After evaluating Applicant and taking note of Applicant's sustained abstinence, Mr. A found Applicant to have no alcohol problem requiring counseling or treatment. Applicant has exhibited no other indicia of drinking problems in or out of the workplace since his last alcohol-related incident in June 1998 (a period of over five years) and is credited with restored judgment relative to his judgment lapses associated with his prior alcohol-related incidents.

By his actions to date in adopting abstinence and seeking counseling to clear himself of any potential alcohol problems, Applicant provides good evidence of his learning from his judgment lapses associated with his alcohol-related incidents. His efforts enable him to take advantage of several mitigating conditions of the Adjudicative Guidelines for alcohol: MC 2 (the problem occurred a number of years ago and there is no evidence of a recent problem) and MC 3 (positive changes in behavior supportive of sobriety)

Taking into account all of the evidence developed in the record, Applicant's mitigation efforts to date reflect excellent progress and considerable learning of the dangers of alcohol abuse. His avoidance of any additional alcohol-related incidents over the past five years, demonstrated sustained abstinence, and positive prognosis by his substance abuse counselor is enough to facilitate safe predictive judgments about his ability to avert any alcohol abuse relapses or recurring problems with law enforcement authorities in the foreseeable future. Favorable conclusions warrant with respect to the alcohol-related allegations covered by subparagraphs 1.a through 1.f of Guideline G.

Posing potential security concern as well are Applicant's omissions of two of his previous DuI arrests (*i.e.*, his 1986 and 1991 arrests) from his March 2002 SF-86. His omissions warrant no applicability of DC 2 (deliberate omission, concealment, or falsification of relevant and material facts) of the Guidelines for personal conduct in view of the drawn inferences his omissions were not deliberate. This is not to say his mistaken reliance on his senior group assistant's previous advice about limiting the scope of the question covering alcohol-related arrests to seven years was reasonable. What is concluded is that his omissions did not rise to the level of knowing and wilful concealment. So, under all of the circumstances considered (including his frank and unprompted disclosures in his ensuing DSS interview) Applicant's omissions were not substantiated to be the result of deliberate falsification.

Favorable conclusions warrant with respect to subparagraph 2.a of the allegations covered by Guideline E. Because Applicant's listed 1996 failure to appear allegation is considered a mistake, favorable conclusions warrant as well re: subparagraph 2.b. Further, in considering the isolated nature of his 1997 citation for failure to present proof of insurance and a valid driver's license, this allegation is mitigated sufficiently to enable Applicant to be credited with favorable conclusions re: subparagraph 2.c of the SOR.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E 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 CONSUMPTION): 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): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR 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 Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge