

DATE: February 18, 2004

In Re:

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SSN:-----

Applicant for Security Clearance

ISCR Case No. 02-20454

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 47-year-old cost analyst was arrested on alcohol-related driving offenses in 1990,1991, and 2001. There was a 10-year gap between the first two incidents, in which Applicant has been a substantial consumer of beer and the 2001 incident, in which he had consumed wine at a holiday party. The incidents were too far apart in time to constitute a pattern of alcohol abuse. For the past two years, Applicant's alcohol consumption has been limited to a glass of wine during weekend dinners. Applicant has a highly positive work record and family situation. There is no evidence of a current problem and Applicant avers an intent not to repeat past mistakes. Mitigation has been shown. Clearance is granted.

**STATEMENT OF THE CASE**

On May 6, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On May 23, 2003, Applicant submitted a response to the allegations set forth in the SOR. Applicant elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on August 20, 2003. On September 24, 2003, a Notice of Hearing was issued, setting the hearing for November 3, 2003. The Government did not present any witnesses but offered 3 exhibits, Government Exhibits (GX) 1 - 3. Applicant testified and offered 17 exhibits, which were marked as Applicant's Exhibits (AX) A - Q. All exhibits were admitted

into evidence. The transcript (Tr) was received at DOHA on November 14, 2003.

### **FINDINGS OF FACT**

The SOR contains three allegations, 1.a. - 1.c. under Guideline G (Alcohol) and four allegations, 2.a - 2.d; under Guideline J (Criminal Conduct). In his response to the SOR, Applicant admitted allegations 1.a. and 1.c., but denied allegation 1.b. As to Guideline J, Applicant did not specifically admit or deny to SOR 2.a, 2.b., or 2.c., all of which relate to the three alcohol-related incidents alleged in SOR 1.a., 1.b., and 1.c. He did admit allegation 2.d., with an explanation. His admissions are accepted and deemed findings of fact.

After considering the totality of the evidence derived from the hearing testimony and all evidence of record, I make the following FINDINGS OF FACT as to each SOR allegation:

#### ***Guideline G (Alcohol)***

1.a. - On or about December 22, 2001, Applicant was arrested in State A and charged with Driving Under The Influence of Alcohol (DUI) and Driving Under the Influence of Alcohol with .08% or higher blood alcohol level. The charge was amended to Wet Reckless, Applicant was found guilty, was sentenced to pay a fine of \$930.00, three years probation, and was required to attend alcohol awareness classes

1.b. - On or about December 20, 1991, Applicant was arrested in State A and was charged with Driving a vehicle Under the Influence of Alcohol and/or Drugs. On March 16, 1992, he entered a guilty plea, and was sentenced to five years summary probation, required to attend a First Conviction Program, pay a fine of \$1,500.00. Applicant did not actually spent 20 days in jail, as alleged in the SOR.

1.c. - On or about August 1, 1990, Applicant was arrested in State A for DUI. He pleaded guilty and was sentenced to pay a fine of \$1,000.00 to \$1,200.00, five years unsupervised probation,

and was ordered to attend six weeks of alcohol awareness classes.

#### ***Guideline J (Criminal Conduct)***

2.a. - The allegation as stated in SOR 1.a.

2.b. - The allegation as stated in SOR 1.b.

2.c. - The allegation as stated in SOR 1.c.

2.d. - On or about November 29, 1993, Applicant was arrested in State A for Possession of a Controlled Substance, which is not described in the record. Applicant was not formally charged and the matter was subsequently dismissed.

Applicant is a hard-working, dedicated, honest, and trustworthy, as stated by numerous coworkers and friends. (AX F, AX G, and AX I). Applicant has received cash awards for "A job well done" by his employer in 2002 and 2003 (AX D and AX E) and recognition for his contributions at work. (AX F - AX J). He has documented his continuing educational achievements. (AX P). An October 30, 2003, drug screening test result report shows no evidence of any chronic alcohol or drug use by Applicant (AX G).

### **POLICIES**

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Considering the evidence as a whole, I find the following specific 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:

1. alcohol-related incidents away from work, such as driving while under the influence.
4. habitual or binge drinking consumption of alcohol to the point of impaired judgment.

Conditions that mitigate security concerns include:

1. the alcohol-related incidents do not represent a pattern.
2. the problem occurred a number of years ago and there is no indication of a recent problem.
3. positive changes in behavior supportive of sobriety.

#### Guideline J (Criminal Conduct)

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

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

1. any criminal conduct, regardless of whether the person was formally charged.
2. a serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

1. the criminal behavior was not recent.
2. the crime was an isolated incident.
4. the factors leading to the violation are not likely to recur.
5. there is clear evidence of rehabilitation.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

If the Government meets its burden (by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion shifts to the Applicant to offer evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct falling within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue Applicant's security clearance.

## CONCLUSIONS

### *Alcohol Consumption and Alcohol-Related Criminal Conduct*

SOR 1.a - 1.c and 2.a. - 2.c -- Applicant is 47 years old and has been consuming alcoholic drinks for 29 years, since he was 18. He drank mostly beer, and the amount varied from one six-pack a month from 1978 to 1986, to one 12-pack a week from 1986 to 1995. Since 1995, he has reduced his consumption back to about one six-pack a month. (GX 2). He was arrested on alcohol-related driving offense in 1990 and 1991, and again in December 2001, four years after receiving a DoD security clearance in January 1987 and 15 months after completing his security clearance application (SF 86) in September 2000. (GX 1 at Item 31).

Applicant has discussed the circumstance surrounding his 1990 and 1991 alcohol-related arrests in some detail (Tr at 41-47). By themselves, the two incidents have minimal current security significance. As Applicant matured, his consumption of alcohol decreased and no more alcohol-related incidents occurred for 10 years. The December 22, 2001 arrest occurred after Applicant had consumed three glasses of wine at a holiday party with friends before leaving in his car. (GX 2). Applicant had not eaten yet when he had "a couple glasses of wine," talked for a while and then drove home (Tr at 48). He did not realize he had consumed enough to have a .08% blood alcohol level when he was stopped. (Id.). Applicant attributes the absence of alcohol-related problems during th 1990s to his marriage in 1995, a fundamental change in life style, and increased maturity. (Tr at 47). His wife is not a drinker. (Tr at 52).

He no longer drinks beer, and limits his consumption to a glass of red wine when he and his wife go out to dinner. (Tr at 54). He has become basically a homebody, goes to work early, works hard, has been promoted, and has focuses on his career and wife. (Id.). Applicant admitted in his response to the SOR that he intends to continue consuming alcohol on occasion, and reiterated his intent in his testimony, because he doesn't think he will have any problems by doing so. (Tr at 57).

Applicant has been diligent in avoiding any more problems since the December 2001 arrest and views the arrest as an aberration, based on unusual circumstances, including changing homes and attending a holiday party with old friends. He credibly expressed his having learned the lessons he should have learned earlier, but the likelihood of his being able to avoid future problems is increased by his focus on protecting his family and his reputation, his having risen to a "very high position" in his company," (Tr at 69) with a lot lose if he repeats his last mistake, now more than two years in the past. His exhibits support his contention that he has been a highly productive citizen and employee. (AX A-AX Q). The classes he attended after the 2001 arrest and conviction taught him a lot about alcohol use and abuse. (Tr at 74). He does not drink at all during the week and limits his weekend drinking to a glass of wine with dinner. (Tr at 80).

### SOR 2.d. - Drug Possession

Applicant admits his arrest in 1993, but he denies the allegation that he possessed a controlled substance. His explanation was that an acquaintance/friend he had made in a club asked him to give something to a third person in the club, but that he became distracted and never made the delivery. (Tr at 59-61). He was stopped by two officers in the parking lot outside the club who told him they had been informed he was carrying drugs. He agreed to a search of his person, as a result of which the plastic bag was discovered wrapped in paper. (Tr at 59-62). Applicant states that when he went to court, he was told by a court officer that he was not being charged, and he left, never finding out exactly what the substance was or why the matter was dismissed. As a result, Applicant stopped going to bars. (Tr at 61).

The evidence relating to this arrest is found in the FBI Criminal History, GX 3, which also contains the notation "2-2-93 Pros[ecution] Reject[ed]." The nature of the controlled substance is not identified, or even if it was a controlled substance, leading to the possibility that what Applicant had was not a controlled substance. In any case, the

Government has not established that Applicant was in possession of an illegal substance. There is no other mention in the case file of any drug involvement by Applicant. In the absence of evidence of culpability, I find that Applicant was not knowingly in possession of a controlled substance. I find for Applicant as to this charge.

As to the Alcohol Consumption guidelines, it is undisputed that Applicant has had three arrests for alcohol-related driving offenses, in 1990, 1991, and 2001. Disqualifying Condition (DC) 1 applies, since alcohol-related incidents away from work occurred on three different occasions. DC 4 also applies in that the three arrests indicate binge (but not habitual) drinking to the point of impaired judgment on those three occasions. Mitigating Condition (MC) 1 applies. Considering the 10-year gap between 1991 and 2001, there is a history, but I do not find a pattern; MC 2 applies - the problem occurred a number of years ago and there is no indication of a recent problem; MC 3 applies, since the record shows positive changes in behavior in support of sobriety.

As to the Criminal Conduct guidelines, both disqualifying conditions are applicable. At the same time, Mitigating Conditions, MC 1 applies since the 2001 arrest is deemed not recent; DC 2 is applicable in that the only offence in the past 12 years was an isolated incident, since the 10 year-old matters are too distant to be considered a part of a pattern and; MC 5 is applicable since the record shows several years of praiseworthy conduct which, in turn, constitutes clear evidence of successful rehabilitation.

Overall, I conclude that Applicant has shown himself to be a man of integrity and one who has matured enough to be able to restrict his drinking and avoid any future drinking-related problems. Considering the evidence as a whole, I conclude that Applicant currently possesses the judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

### **FORMAL FINDINGS**

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

Guideline G (Alcohol Consumption) For the Applicant

Subparagraph l.a. For the Applicant

Subparagraph l.b. For the Applicant

Subparagraph l.c. For the Applicant

Guideline J (Criminal Conduct) For the Applicant

Subparagraph l.a. . For the Applicant

Subparagraph l.b. For the Applicant

Subparagraph l.c. For the Applicant

Subparagraph l.d. 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 Applicant.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**