

DATE: July 8, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32763

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 32-year-old field service representative was arrested and convicted of alcohol-related offenses in 1997 (three felonies and consecutive sentences to more than one year incarceration) and 2003 (misdemeanor DUI). He violated his 1998-imposed probation in 2002. He received a general discharge from the Air Force in 1998. The 1998 conviction and sentence bring him within the provisions of 10 U.S.C. 986, which make him ineligible to hold a security clearance. His overall alcohol abuse and related arrests also warrant a finding of ineligibility. No mitigation has been established. Clearance is denied.

**STATEMENT OF THE CASE**

On November 18, 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.

In a December 16, 2003 reply to the SOR, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me on January 24, 2004. A Notice of Hearing was issued on March 24, 2004, and the hearing was conducted on April 27, 2004. The transcript was received at DOHA on May 27, 2004.

**FINDINGS OF FACT**

Applicant is a 32-year-old field service representative for a defense contractor. The Government opposes the granting of a security clearance to Applicant because of security concerns under three separate guidelines. The SOR contains four

allegations<sup>(1)</sup> under Guideline G (Alcohol); one allegation under Guideline J (Criminal Conduct); and one allegation under Guideline E (Personal Conduct). In his response, Applicant admits allegations 1.a. and 1.b. and denies allegation 1.c. under Guidelines G and admits the single allegations, 2.a and 3.a., alleged under Guidelines J and E, respectively. His replies are generally accompanied by explanations that have been considered as evidence in making this determination. The specific admissions found in the response are incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

#### Guideline G (Alcohol Consumption)

As alleged in the SOR, Applicant was arrested, charged, and/or convicted as follows:

1.a. - On February 3, 1998, after consuming alcohol to excess, Applicant was arrested and charged with Counts I and II Assault in the Second Degree, felonies; Count III Failure to Give Information and render Assistance, a felony; and Count IV Driving While Intoxicated. He pleaded no contest and was adjudicated guilty on all counts. He was sentenced to four years incarceration, with two years suspended, on Count I; two years incarceration, with one year suspended on Count II; three years incarceration with one and a half years suspended on Count III; and one year incarceration with six months suspended on Count IV. The sentence on each count was to run consecutively. Applicant's license was revoked for six months and he was released from prison in about July 1999, and he was then placed on five years probation.

The Government has established that Applicant was arrested on a new alcohol-related offense (DUI with a blood alcohol reading of .208) in June 2003 (GX 14, see also AX B at 3). He was sentenced to 365 days in jail, with 275 days suspended, fined \$10,000, with \$6,000 suspended, and placed on probation for five years, i.e. until October 2008.

1.b. - Applicant violated his 1997-related probation by entering a bar in about June 2002. He was ordered to attend a drug and alcohol awareness course.

1.c. - In his sworn statement to an agent of the Defense Security Service (DSS) in September 2002 (GX 2), Applicant expressed an intent to resume consumption of alcohol at the completion of his probation. In his December 2003 response to the SOR, he declared an intent "to abstain from all future use of alcohol." He reiterated this intent during his hearing testimony (Tr at 23, 24), but I find his promise to be not credible.

1.d. Applicant was arrested and convicted in June 2003 of Driving Under the Influence of Alcohol, a misdemeanor. He registered .208 blood alcohol when tested.

#### Guideline J (Criminal Conduct)

SOR 2.a. - The conduct cited under 1.a., 1.b., and 1.d., above, constitutes three acts of criminal misconduct. The conduct cited under 1.a., cites multiple criminal convictions and multiple sentences of incarceration for more one year. Such facts bring this matter within the scope of 10 U.S.C. 986 which prohibits the granting or renewal of a DoD security clearance to anyone so charged and so sentenced. The only exception to the prohibition is that the Secretary of Defense may authorize an exception in meritorious cases.

#### Guideline E (Personal Conduct)

SOR 3.a. - Applicant received a General Discharge Under Honorable Conditions from the U.S. Air Force in June 1999, as a result of his criminal conduct as set forth in SOR 1.a., above

### **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.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above 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.

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. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that 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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private or work life, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

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 (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

## CONCLUSIONS

### Guideline G (Alcohol Consumption)

The nature and extent of Applicant's alcohol use and abuse is not clear from the record. However, while in prison in 1998, Applicant participated in an Inmate Substance Abuse Treatment Program. A Patient Care Monitoring Summary dated August 21, 1998 (GX 12), states the following: "Client meets DSMIV [Diagnostic and Statistical Manual IV] Criteria for 305.00 Alcohol Abuse in early full remission /ASAM Admission Criteria 0.5 Early Intervention." The discussion of Substance [Alcohol] Abuse found in the DSM IV clarifies that the diagnosis requires "a maladaptive pattern of substance use leading to clinically significant impairment or abuse, as manifested by one (or more) of [four examples of substance-related behavioral or legal] problems . . . occurring within a 12-month period."

1.a. - As to Applicant's 1997 arrest and conviction, the police/court/military documents provide significant details that explain the serious nature of the offense (GX 5 - GX 10) and the rationale for Applicant's separation from the U.S. Air Force (GX 4). Applicant was driving while intoxicated, ran a red light, hit another car in the intersection, caused bodily harm to two occupants in the other car, left the scene without offering assistance, ran and hid in a park, and resisted arrest until bitten by a police dog.

1.b. - Applicant's poor judgment, as shown by 1.a., was compounded after he was released from jail when he resumed the consumption of alcohol. He violated a condition of his probation when he entered a bar to get a drink in June 2002, a month after he completed his security clearance application (GX 1).

1.c. - The Air Force found Applicant's behavior in 1997 to be egregious enough to warrant his separation from the service with a general discharge (GX 4). The Air Force authorities concluded in November 1998 that "the actions which resulted in the civilian conviction constitute a significant departure from the conduct expected of airmen and, therefore, warrant a general discharge" (Id.).

1.d. - Applicant's 2003 arrest and conviction on a new alcohol-related offense (DUI with a blood alcohol reading of .208) establishes beyond a doubt that Applicant is presently unable to control his impulse/addiction. While I do not doubt Applicant's sincerity in promising to abstain from alcohol in the future (Tr at 25), I am unable to give his promise any substantial credence. There is simply no evidence suggesting he presently has the ability to carry out his promise.

Disqualifying Conditions (DC) 1 (alcohol-related incidents away from work such as Driving

Under the Influence) and 5 (consumption of alcohol subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program) are shown by the record. No possible Mitigating Conditions (MC) have been established. Applicant's alcohol abuse and problems are still recent and rehabilitation has not yet been demonstrated.

Guideline J - The evidence supporting the applicability of Guideline H also establishes the fact of Applicant's criminal conduct. Both DC 1 (any criminal conduct) and 2 (I find the 1997 criminal conduct to be "serious" in terms of its security significance. No Mitigating Conditions have been shown. Applicant's criminal conduct is still recent and there is no "clear evidence of successful rehabilitation."

Guideline E - There is "reliable, unfavorable information" about Applicant ( DC 1). No parallel Mitigating Conditions have been shown.

Applicant's testimony and written explanations do not come anywhere near counter balancing the negative impact of his serious criminal misconduct, which also establishes the existence of extremely poor judgment, unreliability, and untrustworthiness. I have given careful consideration to Applicant's written submissions. His work evaluations describe a valuable employee, but they do not directly relate to his alcohol-related criminal problems. The May 1, 2004 letter from the Army Captain commanding the unit in which Applicant works states an awareness of Applicant's alcohol-related offenses, and concludes that Applicant "has not allowed "these problems [to] affect the quality of his work (AX B at page 2). The balance of the letters of recommendation provide similar insight into Applicant's work ethic. On balance, however, their impact is lessened by Applicant's own continuing conduct in abusing alcohol.

Allegation 1.a. describes a criminal conviction and sentences of more than one year incarceration on several counts of the criminal complaint. Applicant's conduct comes squarely within the provisions of 10 U.S.C. 986, which prohibits the granting or retention of a security clearance by anyone convicted of a crime and sentenced to more than one year. I also conclude, based on Applicant's overall criminal history from 1997 to 2002, that an adverse decision would be required even in the absence of this statute.

### **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 Against the Applicant

Subparagraph 1.a. . Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. . Against the Applicant

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 2.a. Against the Applicant

Guideline E (Personal Conduct)- Against the Applicant

Subparagraph 3.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.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**

1. As originally written, the SOR contained three allegations. A fourth allegation, SOR 1.d., was added during the hearing at the request of Department Counsel, to conform to the evidence, which showed a second alcohol-related arrest, in 2003.