

DATE: November 15, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04775

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esq., Department Counsel

**FOR APPLICANT**

Scott M. Badami, Esq.

**SYNOPSIS**

Applicant is a 57-year-old parts and equipment inspector for a defense contractor. Applicant has one DUI arrest in June 2002. Applicant completed his security clearance application (SCA) in 2001, but it was not submitted to the Government until 10 months later in June 2002, two weeks after his DUI arrest. Applicant did not change any information on the SCA except the areas indicated by his employer's security officer. Applicant mitigated the alcohol and personal conduct concerns. Clearance is granted.

**STATEMENT OF THE CASE**

On December 8, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn Answer, February 24, 2004, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on June 1, 2004.

A Notice of Hearing was issued on June 1, 2004, setting the hearing for June 17, 2004. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented two exhibits which were admitted into evidence. Applicant appeared and testified. Applicant submitted 15 exhibits. I received the transcript (Tr.) of the hearing on July 7, 2004.

## FINDINGS OF FACT

Applicant admitted the allegations in Paragraph 1, and denied the allegations in Paragraph 2 of the SOR. Those admissions are incorporated herein 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 is 57 years old. He is married, but separated, with one adult son, and two grandchildren. Applicant is a veteran, and works for a defense contractor as a parts and inventory inspector. Applicant has a good work record, and has received various certificates of appreciation from his employer for 35 years of good service and 10 years of perfect attendance. Applicant submitted several character reference letters showing he is well-regarded by his co-workers and superiors. Applicant's supervisor testified on his behalf favorably. (Tr. 15 to 25, 33 to 40; Exhibits A to I, L to P)

Applicant was arrested on June 14, 2002, for driving while intoxicated (DWI). He had worked a twelve-hour shift for his employer, had no breakfast or lunch, and arrived home. Changing into his swimsuit, he went to his home pool with a glass of vodka containing three to four ounces of vodka, or as much as a pint. Later, feeling hungry, he drove to the nearest fast food restaurant and while returning to his home he was stopped and arrested for DWI. Applicant had a BAC of .23. Applicant notified his supervisor and that person's supervisor the next day that he had been arrested for DWI and would not be into work. In November 2002 Applicant was given a suspended imposition of sentence, two years probation, required participation in an alcohol education program, and required community service. Applicant's probation ends in November 2004. Applicant has not had a drink of alcohol since this arrest, and has no other arrests, alcohol or otherwise, on his record. Applicant does not drink when his grandchildren are visiting, and abstains from alcohol since his diagnosis of Type 2 diabetes made subsequent to the arrest. Applicant is very embarrassed by this arrest and does not intend to drink alcohol again. Applicant has never been diagnosed as having any alcohol abuse or dependence problem, nor has he ever had any difficulty at work related to alcohol consumption. (Tr. 21, 43 to 52, 62 to 69; Exhibits 2, I, and K)

Applicant completed his latest security clearance application (SCA) in August 2001. It was transmitted on disk or electronically to another office in his company, and he heard nothing more about it until June 2002, about two weeks after his DWI arrest. The security officer told him there were certain entries that had to be corrected, and Applicant made those corrections, but made none other. He did not add the information about his DWI arrest to the June 27, 2002, dated submission of the SCA. Applicant made only the changes he was told to make, and did not add additional information to Questions 23 and 24 of the SCA. (Tr. 53 to 56; Exhibits 1 and N)

## POLICIES

"[N]o 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 that 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 judgement, 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 predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

(1) the nature, extent, and seriousness of the conduct;

- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition 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 other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at 6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of 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. E2.A7.1.1.

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

- (1) Alcohol-related incidents away from work, such as driving while under the influence. E2.A7.1.2.1.

Conditions that could mitigate security concerns include:

- (1) The alcohol related incidents do not indicate a pattern. E2.A7.1.3.1.
- (2) The problem occurred a number of years ago and there is no indication of a recent problem. E2.A7.1.3.2.
- (3) Positive changes in behavior supportive of sobriety. E2.A7.1.3.3.

**Guideline E - Personal Conduct:**

*The Concern:* 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 a security concern and may be disqualifying include: E2.A5.1.2.

(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; E2.A5.1.2.2.

Conditions that could mitigate security concerns include:

(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. E2.A5.1.3.3.

**CONCLUSIONS**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Addressing the alcohol involvement under Guideline G, the Government established its case. Applicant has one DWI arrest and disposition in his life that occurred in 2002. Disqualifying Condition (DC) 1 applies.

This DWI incident occurred two years ago, and was the only such arrest in Applicant's life. He has abstained from alcohol to avoid further embarrassment, to improve his health, and to avoid any actions inappropriate in front of his two grandchildren. There is no indication evidence of a current problem and there is no diagnosis by any professional of an alcohol problem. The 2002 arrest does not indicate a pattern. Mitigating Conditions (MC) 1, MC 2, and MC 3 apply. I conclude this guideline for Applicant.

Considering Paragraph 2 and Guideline E, I conclude the Government established its case. Applicant did not disclose his June 14, 2002, DWI arrest on his SCA dated June 27, 2002. He did not list the offense in response to Questions 23 and 24 of the SCA. DC 2 applies.

Applicant completed the SCA in August 2001 and submitted it. The day after his arrest, Applicant disclosed it to his supervisor and the next level supervisor. He heard nothing from his company's security office nor the Government until June 2002 when the security officer asked to come in and make certain specifically directed changes or corrections. Applicant did so, complying with those instructions strictly, and made no other changes. Applicant later disclosed his DWI arrest to the Government investigator. This omission I conclude was not deliberately made with the intention to deceive the Government because the employer already knew about the arrest, and the changes made to the SCA were specifically directed by the company's security office, as Exhibit N states. MC 4 applies. I conclude this guideline for Applicant.

**FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline G: For Applicant

Subparagraph 1.a.: For Applicant

Paragraph 2 Guideline E: For Applicant

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

**DECISION**

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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Philip S. Howe

Administrative Judge