

DATE: May 4, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-06595

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

From 1999 to at least January 2004, Applicant consumed alcohol to the point of intoxication. Between 1999 and 2001, Applicant was convicted of three alcohol-related offenses. In December 2001, when Applicant completed his security clearance application, Standard Form (SF) 86, he failed to list two of his alcohol-related arrests and convictions. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from Applicant's alcohol consumption, personal conduct, and criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On October 21, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 29, 2004, Applicant answered the SOR and requested a hearing. On January 6, 2005, Applicant asked to have his case decided on the written record in lieu of a hearing.

On February 7, 2005, the Applicant received a complete copy of the government's file of relevant material (FORM) dated January 6, 2005. Applicant was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. On March 3, 2005, Applicant responded to the FORM, and Department Counsel did not object to his response. On March 17, 2005, I was assigned the case.

**FINDINGS OF FACT**

The SOR alleges Alcohol Consumption, Personal Conduct, and Criminal Conduct. The Applicant admits to the following: consuming alcohol to the point of intoxication from 1999 to January 2004; to being arrested in February 1999 and charged with being a minor in possession of alcohol and being fined \$225; to being arrested in February 2000 for drunk in public to which he was fined \$200 after pleading guilty; to being arrested in October 2001 and being charged with Driving Under the Influence (DUI). After pleading guilty to the DUI, he was fined \$1,550, sentenced to

two days in jail and required to enroll in an alcohol program; to falsifying his SF 86. These admissions are incorporated herein as findings of fact. After thorough review of the whole record, I make the following additional findings of fact:

The Applicant is 26 years old, has worked for a defense contractor since November 2001, and is seeking to obtain security clearance. The Applicant is regarded by those who know him as approachable, helpful, patient, honest, hard working, the resident shift expert, impressive, an excellent worker, the best teacher, and a valuable asset at work who is willing to stay late or come in early to get the job done. He is able to handle stress or emergencies and his communication skills are excellent.

In February 1999, Applicant was arrested and charged with being a minor in possession of alcohol for which he was fined \$225. In February 2000, Applicant and an acquaintance stole beer from a gas station. Applicant was found hiding on top of a roof. He had a strong odor of alcohol coming from his person, slurred speech, and bloodshot eyes. Applicant was arrested due to his level of intoxication. (Gov Ex 6) He pleaded guilty to being drunk in public and paid a \$200 fine.

In January 2001, Applicant was arrested for DUI. (Gov Ex 7) After pleading guilty to DUI, he was fined \$1,450, sentenced to two days in jail, received 36 months probation, and was required to enroll in an alcohol program. (Gov Ex 8)

In December 2001, Applicant completed his SF 86. In response to question 24, which asked if he had ever been charged with or convicted of any offense related to alcohol, Applicant listed his 1999 public intoxication arrest. He failed to list his 2000 arrest for being drunk in public and failed to list his October 2001 arrest for DUI. He did not list his 2001 DUI arrest because he was afraid he would lose his job and was ashamed to reveal this information to his new employer.

### **POLICIES**

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

### **BURDEN OF PROOF**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 judgment, 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." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

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 which 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. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

### CONCLUSIONS

The Government has satisfied its initial burden of proof under Alcohol Consumption, Guideline G. A history of excessive alcohol consumption raises a security concern because of the potential for deliberate or inadvertent mishandling of classified information due to intoxication. The concern is that 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. The issue is whether the record evidence raises a security concern under the applicable guideline, and here it certainly does.

Applicant has been arrested three time for alcohol-related offenses. In 1999, he was arrested for being a minor in possession of alcohol. In 2000, he was arrested and charged with being drunk in public after he and an acquaintance stole beer from a gas station. In January 2001, Applicant was arrested for DUI. After pleading guilty to DUI, he was fined \$1,450 and sentenced to two days in jail. In his answer to the SOR, Applicant admitted he was still drinking to the point of intoxication to at least January 2004. Disqualifying condition (DC) 1 (E2.A7.1.2.1. *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*) and 5 (E2.A7.1.2.5. *Habitual or binge consumption of alcohol to the point of impaired judgment*) apply.

Applicant's conduct was serious, recent, frequent, and establishes a pattern. He has not introduced persuasive evidence in rebuttal, explanation or mitigation sufficient to overcome the Government's case against him. There is no showing of positive changes in behavior supportive of sobriety, nor efforts to reform his behavior, change his friends, or lifestyle. Because the Applicant meets the disqualifying conditions and none of the mitigating conditions, the alcohol consumption is resolved against the Applicant.

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct), wherein the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions, in providing false information on his December 1998 SF 86 poses a serious potential risk to the nation's security precautions.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern.

In December 2001, when Applicant completed an SF 86 he listed his 1999 public intoxication arrest in response to question 24, which asked if he had ever been charged with or convicted of any offense related to alcohol. He failed to list his 2000 arrest and conviction for being drunk in public, and failed to list his October 2001 arrest and conviction for DUI. The October arrest occurred just two months before he completed the SF 86. He did not list his DUI because he was afraid he might lose his job. Additionally, he was ashamed to reveal this information to his new employer.

None of the mitigating conditions apply to his false answers. His alcohol-related arrests were pertinent to a determination of judgment, trustworthiness, or reliability. There is no showing the Applicant made a prompt, good-faith effort to correct the falsification before being confronted with the facts. There is no indication his omissions were caused by improper or inadequate advice from authorized personnel or based on advice from legal counsel. Because of the serious nature of his falsification, I find against the Applicant as to Personal Conduct, SOR subparagraph 2.

The Government has satisfied its initial burden of proof under Guideline J (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. Applicant falsified his SF 86. DC 1 (E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged.*) and DC 2 (E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*) apply.

MC a (*The criminal behavior is not recent*) does not apply because the falsification was in December 2001. MC c (*The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) and MC d (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) do not apply because the Applicant's conduct was not the result of pressure, coercion, or an involuntary act. There was no acquittal, so MC e (*Acquittal*) is inapplicable. MC f (*There is clear evidence of successful rehabilitation*) does not apply because the record does not establish clear evidence of successful rehabilitation. I find against the Applicant as to criminal conduct, SOR subparagraph 3.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

### **FORMAL FINDINGS**

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

Paragraph 1 Alcohol Consumption: 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

Paragraph 2 Personal Conduct: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Paragraph 3 Criminal 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 the Applicant. Clearance is denied.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.