

DATE: March 2, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-08475

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

Alan V. Edmunds, Esq.

**SYNOPSIS**

Applicant is a 44-year-old employee of a defense contractor who has held a security clearance for about 20 years. In October 1998, Applicant was arrested and charged with driving under the influence of alcohol, but the charges were later dismissed. On a security clearance application in November 1999, Applicant falsely concealed the charge. In July 2001, Applicant had an alcohol-related driving offense, resulting in a criminal conviction. Thereafter, he completed an alcohol-rehabilitation program and has had no alcohol-related incidents since that time. Applicant has mitigated the concerns arising from his alcohol consumption, but failed to mitigate concerns arising from his personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On May 6, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline G, Alcohol Consumption, and Guideline E, Personal Conduct, of the Directive.

Applicant answered the SOR in writing on June 2, 2004. Applicant elected to have a hearing before an administrative judge.

I was assigned the case on October 14, 2004. With the concurrence of the parties, I conducted the hearing on November 17, 2004. The department counsel moved, without objection, to amend the allegation of ¶ 2.a of the SOR by striking the words, "executed by you on," and I granted the motion. Tr. at 16. The government introduced eight exhibits. Applicant's counsel presented 15 exhibits, the testimony of a witness, and Applicant's testimony. I left the record open for five days for Applicant's counsel to submit an authenticated copy of a document. Applicant's representative forwarded the document on November 17, 2004, and Department Counsel acknowledged receipt and the lack of objection on November 23, 2004. I received and admitted the document on November 24, 2005. DOHA received the transcript (Tr.)

on December 9, 2004.

## FINDINGS OF FACT

Applicant denied the allegation in ¶ 2.a of the SOR that he intentionally falsified material facts on a security clearance application. With regard to the traffic citations contained in the allegations in ¶¶ 2.c, 2.d, 2.g, and 2.h of the SOR, Applicant replied that he did not deny receiving the citations, but did not remember them. He admitted the factual allegations in ¶ 1.a, 1.b, 1.c, 1.d, 1.e, 2.b, 2.e and 2.f of the SOR, with explanations. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 44 years old. Ex. 1 at 1. He first began using alcohol in high school at age 16 or 17, drinking beer on occasion. Ex. 6 at 3; Ex. 7 at 1; Ex. K at 1. Between the ages of 18 and 24, while in college and shortly thereafter, he drank about three or four times a month in varying amounts up to about six beers. Ex. 7 at 1; Ex. K at 1.

Applicant holds master's degrees in both electrical engineering and computer science and engineering. Ex. 7 at 1; Tr. at 48. Applicant began working for a defense contractor as a project engineer in 1985. Ex. 1 at 3. He obtained a security clearance in 1985 and has held it for about 20 years. Tr. at 34, 65.

In 1997, Applicant began working for his present employer, a defense contractor, as a principal engineer. Ex. 1 at 3. His supervisors, co-workers, and government counterparts praise his professional qualifications, talents, judgment, character, and ability to handle classified information. Exs. A-I, inclusive, Exs. L and M; Tr. at 28-29, 32.

One evening in October 1998, Applicant went out with friends. Ex. 7 at 2. He had just broken up with his girlfriend and his friends encouraged him to drink shots of alcohol. *Id.* Applicant drank to the point of blacking out. *Id.* While a friend was driving Applicant home, the automobile broke down on a bridge. Ex. 6 at 2. The driver went for help, leaving Applicant with the vehicle. *Id.* The police arrived and arrested Applicant. *Id.* His blood-alcohol concentration was .24 %. Ex. 7 at 4. The police cited Applicant for driving under the influence. Ex. 6 at 2. A judge later dismissed the charges because Applicant's friend was driving the vehicle. *Id.*

In November 1999, Applicant completed an SF 86, Security Clearance Application, to up-date or continue his security clearance. Question 24 on the form asked, "Have you ever been charged with or convicted of any offenses related to alcohol or drugs?" Ex. 1 at 7. Applicant answered "No" to the question. Question 26 on the SF 86 asked, "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)" Applicant answered "No" to this question.

Between 1998 and 2000, Applicant received numerous citations for violating traffic laws. These violations include:

- August 1998 - Speeding (96 mph in a 60 mph zone); crossing/straddling the center line; driving on shoulder. Ex. 3 at 11; Tr. at 38.
- July 1999 - Speeding (70 mph in a 60 mph zone). Ex. 3 at 11.
- July 1999 - Seat belt violation; registration violation-no tabs; missing, obscured or altered license plate. Ex. 3 at 11; Tr. at 38.
- February 2000 - Disobey road sign, accident while moving.
- March 2000 - Driving while license suspended; speeding (35 mph in 25 mph zone); no vehicle license plates. Ex. 2 at 1-2; Ex. 3 at 11.
- March 2000 - Driving with expired license tags. Ex. 2 at 3.

In July 2001, a police officer pulled over Applicant for speeding and drifting over the lane divider. Ex. 3 at 4. The police

officer noticed the odor of alcohol on Applicant's breath and asked if he had been drinking. *Id.* Applicant said "Yes," and agreed to take a field sobriety test. *Id.* Applicant failed the field sobriety test. A portable breath test indicated a blood-alcohol concentration of .191 %. *Id.* When the patrolman found an open container in his vehicle, Applicant volunteered that he was, "drunk from a bar." *Id.* The police officer took Applicant to the station. Applicant consulted his attorney and thereafter refused to consent to a breath test. *Id.* at 5. The state charged Applicant with driving under the influence of intoxicating liquor or drugs. Ex. 3 at 1.

In August 2001, while the criminal charges were pending, Applicant enrolled in an alcohol assessment program. Ex. 7 at 1. Applicant believed the program was run by certified counselors. Ex. 6 at 3. The counselor's diagnosis for Applicant was Alcohol Abuse according to the Diagnostic and Statistical Manual for Mental Disorders (DSM) VI, 305.0. Ex. 7 at 2. Applicant attended weekly therapy and counseling sessions and abstained from using alcohol for the six-month program. Ex. 7 at 4; Tr. at 42.

In February 2002, Applicant pled guilty to an amended charge of negligent driving in the first degree. The court accepted the plea, found him guilty of the offense, and sentenced him to 90 days in jail (with 90 days suspended), and a \$1,000.00 fine (with \$440.00 suspended). Ex. 4 at 3. The suspension period was 24 months, on the condition of no further criminal violations, no alcohol-related infractions, not driving a vehicle without a license and insurance, and completion of the DUI victim's panel within 60 days. *Id.* Applicant paid the fine and costs in the total amount of \$685.00, and completed the DUI victim's panel. *Id.*

In February 2002, Applicant's employer notified the Defense Industrial Security Clearance Office (DISCO) of Applicant's conviction for negligent driving. Ex. 5. Thereafter, a security investigator questioned Applicant about his alcohol consumption. In Exhibit 6, a written statement dated October 18, 2002, Applicant described his normal consumption of alcohol as follows:

I don't normally drink to the point where I become intoxicated, however, maybe five to ten times a year, I will become intoxicated. When intoxicated I will have about four or five beers. The last time I was intoxicated was about two months ago.

...

My use of alcohol has remained about the same throughout the years. I use alcohol socially, normally, at home, and sometimes at parties or in restaurants.

...

I would guess I will continue to use alcohol in the future as I have in the past.

In response to the initiation of this action, Applicant's counsel referred him for evaluation by a psychologist. Ex. K. After reviewing the available evidence, the results of psychological testing, and the interviews of Applicant, the psychologist opined Applicant's history of alcohol abuse was "within normal limits." Ex. 4 at 3. The psychologist concluded Applicant possesses no more than the "normal" risk for alcohol abuse and is at very low risk for alcohol dependence. *Id.*

At the hearing, Applicant testified about his alcohol consumption. Department counsel asked how often he drinks enough to become intoxicated. Applicant volunteered that he did it a few times a year but not since the offense in July 2001 leading to his conviction. Tr. at 51. Department counsel confronted Applicant with his written statement from October 2002, quoted above, in which he admitted becoming intoxicated five to ten times per years, and admitted that he had been intoxicated since the offense in July 2001. Applicant responded that it depended upon the definition of intoxicated. Tr. at 57.

## POLICIES

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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline G, Alcohol Consumption. 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. Directive, ¶ E2.A7.1.1.

Guideline E, Personal Conduct. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

### **Alcohol Consumption**

The Directive sets out certain conditions under Guideline G, Alcohol Consumption, that are potentially disqualifying. Paragraph E2.A7.1.2.1 provides that, "[a]lcohol-related incidents away from work, such as driving under the influence . . . or other criminal incidents related to alcohol abuse," may be disqualifying. Applicant admitted he was convicted of negligent driving and that his conduct was alcohol-related. Ex. K at 1. Additionally, in October 1998 Applicant drank alcohol in public until he blacked out; a later test found his blood-alcohol concentration was .24%. I find that this potentially disqualifying condition applies.

Under ¶ E2.A7.1.2.4 of the Directive, it is potentially disqualifying if a "licensed clinical social worker who is a staff member of a recognized alcohol treatment plan" gives an applicant an evaluation of "alcohol abuse." Applicant was diagnosed with "alcohol abuse" in August 2001, following the incident which ultimately led to his conviction. Ex. 7 at 2. I find this potentially disqualifying condition applies.

The Directive also sets out various conditions that could mitigate security concerns arising from alcohol consumption. Under ¶ E2.A7.1.3.1 of the Directive, it may be mitigating where, "[t]he alcohol-related incidents do not indicate a pattern." The evidence shows two instances where Applicant was out socially and drank to excess, resulting in his arrest. In Applicant's statement dated October 18, 2002, he admitted drinking alcohol to the point of intoxication between five and ten times a year. Considering all the evidence, I am not persuaded this potentially mitigating condition applies.

Paragraph E2.A7.1.3.2 provides that it may be mitigating where, "[t]he problem occurred a number of years ago and there is no indication of a recent problem." The two alcohol-related incidents resulting in Applicant's arrest occurred in 1998 and 2001, respectively, therefore they were a number of years ago. Applicant denied having any alcohol-related incidents since then, and there is no available evidence to the contrary. I conclude this potentially mitigating condition applies.

It may also be mitigating where an applicant demonstrates, "[p]ositive changes in behavior supportive of sobriety." Directive, ¶ E2.A7.1.3.3. Applicant completed an alcohol rehabilitation program after the incident in July 2001. Ex. 7 at 4. Applicant testified at the hearing that now he does not drink more than one or two drinks when he is out socially, and that he rarely drinks at home. Tr. at 53-54. However, his testimony is contradicted by his written statement dated October 18, 2002, in which he indicated he drinks several beers at home during the week, and drinks alcohol to the point of intoxication between five and ten times a year. Ex. 6 at 3-4. In the statement, Applicant also indicated his use of alcohol has remained the same over the years and that he intends to continue using alcohol in the same way in the future. Ex. 6 at 4. Considering all the evidence Applicant has not persuaded me that he has made positive changes in support of sobriety. I find this potentially mitigating condition does not apply.

Under ¶ E2.A7.1.3.4 of the Directive, it may be mitigating where:

Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant was given a diagnosis of "alcohol abuse," and completed an outpatient alcohol rehabilitation program. Also, his counsel submitted a favorable prognosis from a credentialed medical professional. However, the evidence does not reflect that he participates frequently in meetings of Alcoholics Anonymous or a similar organization, or that he abstained from alcohol for 12 months or more. I find this potentially mitigating condition does not apply.

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. The alcohol-related incidents occurred several years ago, and there is no indication of a recent problem. Applicant also successfully completed an alcohol-rehabilitation program. I conclude Applicant has mitigated any potential security concerns arising from his alcohol consumption.

## **Personal Conduct**

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Paragraph E2.A5.1.2.1 of the Directive provides that "reliable, unfavorable information" showing questionable personal conduct may be disqualifying. Similarly, under ¶ E2.A5.1.2.5 of the Directive, a pattern of "rule violations" may be disqualifying. The available evidence shows that between 1998 and 2001, Applicant engaged in numerous violations of the state traffic code. Many were similar or repeated violations, indicating a flagrant disregard for the law. Applicant admitted many of these, and the government's evidence establishes the remaining allegations. While any one offense, standing alone, is relatively minor, the pattern of these offenses suggests an unwillingness to comply with rules and

regulations. I find these potentially disqualifying conditions apply.

Under ¶ E2.A5.1.2.2 of the Directive, "[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire" may be disqualifying. The SOR alleges Applicant deliberately failed to report his arrest in October 1998 on an alcohol-related charge. Applicant asserts he did not intend to misrepresent material facts in answer to Question 24. He maintains he "never went to an arraignment for being formally charged or posted bail or anything." Tr. at 36. Therefore, he contends he "believed that I hadn't really been charged with a crime." *Id.*

I note, however, Applicant admitted he had received a citation for the offense. He had received other citations for other offenses before completing the SF 86 in November 1999, so he had reason to know it constituted a criminal charge. Moreover, in his statement to the investigator about the October 1998 incident, Applicant reported that he was "taken to the police station, was booked and they sent me home in a taxi. I went to court in Seattle where the charges were dismissed as my friend was driving." The statement indicating he was "booked" and that the charges were "dismissed" fairly indicates Applicant knew he had been charged with an offense. Finally, Question 26 on the SF 86 asked whether Applicant had been arrested, charged with, or convicted of any offenses not listed in the questions above, including Question 24. If Applicant really believed he had only been arrested-not charged-for the October 1998 incident, he should have reported it in response to this question. However, Applicant answered, "No," to Question 26. I conclude Applicant deliberately omitted and concealed relevant and material facts by falsely answering "No" on Question 24 of his personnel security clearance questionnaire. This potentially disqualifying condition applies.

Under the Directive, the security concerns arising from questionable personal conduct may be mitigated under certain circumstances. Directive, ¶ E2.A5.1.3. Under ¶ E2.A5.1.3.1, it may be mitigating where "[t]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Applicant's admissions and the government evidence demonstrate the information is substantiated. Also, Applicant's alcohol abuse and his pattern of rule violations are pertinent to a determination of his judgment, trustworthiness, and reliability. I find this mitigating factor does not apply.

Paragraph E2.A5.1.3.2 of the Directive arises where "the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily." Applicant's false statement on his SF 86 occurred in November 1999, therefore it was not recent. Applicant subsequently provided accurate information about the incident in his statement to the investigator dated October 18, 2002; however Applicant has not shown whether he did so voluntarily, or whether the investigator first confronted Applicant with the fact of his criminal charge. Most significantly, I am not convinced Applicant's false statement was an isolated incident. At the hearing, after being reminded of his duty to tell the truth, Applicant testified that he had not been intoxicated since the July 2001 incident, and that he drank only a small amount of alcohol. These statements were inconsistent with his sworn statement to the investigator. I found his proffered explanation unconvincing. For this reason, I cannot find Applicant's falsification on his SF 86 was an isolated incident. I conclude this potentially mitigating condition does not apply.

Under the Directive, it may be mitigating where, "[t]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." As noted above, on October 18, 2002, Applicant provided an accurate statement concerning his arrest and charges arising from the incident in October 1998. However, Applicant has not met his burden of proving that he initiated the efforts at correction, or that his efforts were prompt. I find this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his personal conduct.

### **FORMAL FINDINGS**

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline G: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Subparagraph 2.e: Against Applicant

Subparagraph 2.f: Against Applicant

Subparagraph 2.g: Against Applicant

Subparagraph 2.h: Against Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

Michael J. Breslin

Administrative Judge