

DATE: September 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-09044

**DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a long haul truck driver who is employed by a federal contractor. From 1965 to 1985, Applicant was arrested, charged and/or convicted of sixteen alcohol related incidents. He was convicted and sentenced to two years in jail for one of the offenses and served over one year in jail. The provisions of 10 U.S.C. § 986 apply. Applicant is a recovering alcoholic, has not consumed any alcoholic beverage in twenty years, attended Alcoholics Anonymous, and has no criminal offenses on his record since becoming sober. Applicant is successfully rehabilitated. I recommend a waiver of the provisions of 10 U.S.C. § 986.

**STATEMENT OF CASE**

On July 30, 2004, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guidelines J, criminal conduct.

In a sworn answer received August 7, 2004, Applicant responded to the SOR and admitted all of the allegations. Applicant elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the file of relevant material (FORM) on October 27, 2004. A complete copy of the FORM was received by Applicant on October 29, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and did not provide additional material. The case was assigned to me on November 19, 2004. The decision in this case was delayed by the December 14, 2004, moratorium on decisions to be rendered in cases affected by 10 U.S.C. § 986. The moratorium was lifted on August 3, 2005. Department Counsel was required by August 15, 2005, to notify the administrative judge if any case affected by the moratorium was to be terminated. No such notice was provided by Department Counsel in this case.

**FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, statements, and the record, I make the following findings of fact:

Applicant is a 58-year-old long-haul truck driver who works for a federal contractor. He works as a team with his wife and has been working for the same employer since 2000. Applicant has been married to his current wife since 1984 and was married twice before, both ending in divorce. He has one adult child from his second marriage.

Applicant admitted all the allegations and is a self-admitted recovering alcoholic. From September 6, 1965, when he was 18 years old, until May 25, 1985, when he was 38 years old, Applicant drank to excess and was arrested sixteen times. Twelve of the arrests<sup>(2)</sup> were for driving under the influence of alcohol and the other four arrests<sup>(3)</sup> included the offenses of drunk and disorderly, aggravated assault, malicious property damage and resisting a police officer. Applicant was found guilty of many of the charges. There is no information in the record regarding the disposition of the charges alleged in SOR subparagraph 1.h. (malicious property damage), 1.k., 1.m., and 1.p. (all driving under the influence of alcohol charges).

Applicant was fined for many of his offenses and was also sentenced to confinement for varying lengths of time, and given probation. On October 25, 1984, Applicant was again arrested for driving under the influence of alcohol and was charged with a felony.<sup>(4)</sup> Applicant was found guilty and sentenced to two years in prison and fined \$500.00. Applicant served six months, was released on parole, and was arrested and charged on May 25, 1985 for driving under the influence.<sup>(5)</sup> He then was confined for nine months.

Applicant has not had any alcoholic beverage of any kind since May 26, 1985, the day after his last arrest.<sup>(6)</sup> After Applicant's last incarceration he attended Alcoholics Anonymous (AA) "and has been sober ever since."<sup>(7)</sup> Applicant has not been involved in any criminal activity since May 25, 1985. Applicant admits he was young and foolish and since abstaining from alcohol he has strived to be "honest, honorable, and responsible."<sup>(8)</sup>

### POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, criminal conduct with its respective DC and MC, applies in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(9)</sup> The government has the burden of proving controverted facts.<sup>(10)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(11)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.<sup>(12)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(13)</sup>

No one has a right to a security clearance<sup>(14)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(15)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(16)</sup>

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. <sup>(17)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

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

Additionally, 10 U.S.C. § 986, prohibits the Department of Defense (DoD) from granting or renewing a security clearance, absent a waiver, to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to imprisonment for a term exceeding one year, and was incarcerated for at least one year.

### CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) apply. Applicant was arrested, charged with, and/or convicted of, twelve driving under the influence of alcohol offenses and various other offenses from 1965 through 1985.

I considered all the mitigating conditions and specifically considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1 (*The conduct was not recent*) and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*.) I conclude both of the mitigating conditions apply. Applicant is an admitted recovering alcoholic. All of his criminal activity was alcohol-related. Since the day after his last arrest, May 26, 1985, he has not consumed any alcoholic beverage. Since that date he has no criminal record. Therefore, none of his criminal conduct is recent. More importantly, the impetus behind his criminal conduct, his alcohol consumption, is no longer a factor in his life. Applicant became a member of AA and is now a sober responsible citizen. Applicant has been sober for twenty years. There is clear evidence of Applicant's successful rehabilitation. Applicant has mitigated the security concerns regarding his criminal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Mitigation of the disqualifying condition is not sufficient to grant Applicant a security clearance. Under the provisions of 10 U.S.C. § 986, known as the Smith Amendment, absent a waiver, the Defense Department cannot grant a security clearance for any person convicted and sentenced in any court in the United States for a crime and incarcerated as a result of that sentence for at least one year. Applicant was convicted of and sentenced to two years in prison for driving under the influence of alcohol, a felony, and was incarcerated for more than one year. The provisions of 10 U.S.C. § 986 apply.

### FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1: Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Subparagraph 1.k. For the Applicant

Subparagraph 1.l. For the Applicant

Subparagraph 1.m. For the Applicant

Subparagraph 1.n. For the Applicant

Subparagraph 1.o. For the Applicant

Subparagraph 1.p. For the Applicant

Subparagraph 1.q. 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. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986 .

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. SOR subparagraphs 1.c.-1.g., 1.i., and 1.k.-1p.
3. SOR subparagraphs 1.a., 1.b., 1.h., and 1.j.

4. SOR subparagraph 1.o.
5. Item 5 at 2.
6. Item 3.
7. Item 5 at 2.
8. Item 3.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
11. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
14. *Egan*, 484 U.S. at 531.
15. *Id.*
16. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
17. Executive Order 10865 § 7.