

DATE: July 6, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-07323

**ISION OF ADMINISTRATIVE JUDGE**

**JUAN J. RIVERA**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

James J. Vergara, Jr., Esq.

**SYNOPSIS**

In 1999 and 2004, Applicant was charged with driving under the influence of alcohol. His favorable evidence is not sufficient to establish his past use of alcohol is no longer a concern. Applicant also deliberately failed to disclose his 2004 driving under the influence charge and related treatment in his 2004 SF 86. Applicant's overall behavior, including his demeanor and testimony, does not instill confidence that he can be trusted to properly safeguard classified information. He failed to mitigate security concerns raised by his alcohol consumption and personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On November 8, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline E ( Personal Conduct) and Guideline G (Alcohol Consumption). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information. [\(1\)](#)

Applicant answered the SOR (Answer) on November 22, 2005, and requested a hearing. The case was assigned to me on January 9, 2006. On February 16, 2006, I convened a hearing at which the government presented four exhibits, that were admitted without objection and marked GE 1 - 4, to support the SOR. Applicant testified on his own behalf, and presented the testimony of five witnesses and ten exhibits that were admitted without objection and marked AE 1 - 10. DOHA received the transcript (Tr.) on March 1, 2006.

**FINDINGS OF FACT**

In his answer to the SOR, Applicant admitted SOR allegations 1.a, 1.b, 1.c, and 1.d (with explanations). He denied the allegations in subparagraphs 2.a and 2.b. His admissions are incorporated herein as findings of fact. After a thorough

review of the pleadings, Applicant's testimony, and the evidence, I make the following additional findings of fact:

Applicant is a 29-year-old simulations systems analyst. He is married and has no children. Applicant attended college between 1995 and 2001, and was awarded a bachelor's degree in computer science. He completed another semester of college in 2002. From 1998 to March 2004, Applicant held numerous temporary jobs waiting for the right job opportunity. In March 2004, he was hired by a Department of Defense (DOD) contractor. He worked in that job until December 2005<sup>(2)</sup> when he was terminated solely because he was denied a security clearance.<sup>(3)</sup>

At his hearing, Applicant expressed particular pride in his job providing technical support for military computer training simulations and managing information systems. The testimony of his five witnesses and the letters of recommendation<sup>(4)</sup> attest to his excellent reputation as a responsible, motivated, hardworking, and a valuable employee. Those who are in a position to know him well believe him to be dependable, honest, and trustworthy. His supervisors recognized his superior performance, excellent knowledge, exceptional technical and verbal skills, and strongly endorsed his suitability for a security clearance.

Applicant's Guideline G security concerns arose out of two alcohol related incidents. In 1999, at age 22, Applicant attended a birthday party. After drinking a number of beers, he drove home, fell asleep at the wheel, and was involved in a one car accident. He and his passenger suffered minor injuries. Applicant was charged with driving under the influence of alcohol (DUI) and reckless driving. The charges were later dismissed.<sup>(5)</sup>

Applicant's testimony was evasive concerning the number of beers he consumed prior to his accident. He testified the incident was seven years ago and claimed he did not recall how many beers he consumed. He believed he drank anywhere between three and five beers, but claimed he was not intoxicated. He also claimed that alcohol had nothing to do with his falling asleep and that alcohol did not contribute to his accident.<sup>(6)</sup>

On March 10, 2004, Applicant submitted a very detailed and complete security clearance application (SF 86)<sup>(7)</sup> in which he disclosed his two 1999 alcohol-related charges. On March 28, 2004, Applicant was arrested and charged with DUI. He explained that the day before he attended a chilli cook off from about 2:00 to 5:00 P.M., and consumed approximately four to five beers. He then drove 20 miles to a friend's home, was there from about 8:00 to 11:00 P.M., and consumed approximately two to three more beers. On his way home, at approximately 12:00 A.M., Applicant was stopped by a police officer for failure to dim his headlights. The police officer detected Applicant had been drinking, and administered a field sobriety tests which Applicant failed. He was arrested and charged with DUI. He spent the night in jail and his driver's license was suspended.<sup>(8)</sup>

The next day, Applicant disclosed his arrest for DUI to "D." D was a government civilian employee, and Applicant's first-line technical supervisor. D was also a longtime close friend of Applicant's family, and had recommended Applicant for his job. Applicant did not inform his employer, or anyone else within his supervisory or technical chain of command of his DUI. D did not inform Applicant's employer or anyone else within the government of Applicant's DUI. Applicant stated he asked D whether the DUI would adversely affect his security clearance application and he was told, "We would hope for the best."<sup>(9)</sup>

After his 2004 DUI, Applicant realized he needed help. On the advice of his attorney, he entered a substance abuse counseling program in June 2004. He attended counseling three times a week and participated on Alcoholic Anonymous (AA) two times a week until January 2005.<sup>(10)</sup> Applicant's substance abuse program included his taking a breath analyzer test after every counseling session. Applicant testified he always passed the breathalyzer test.

Applicant entered into a deferment program for his DUI charge. The court required Applicant to successfully participate in a 12-month substance abuse program, to pay a \$500 fine, and avoid further involvement with law enforcement. In January 2005, after approximately seven months of alcohol rehabilitative counseling, the court determined Applicant had successfully complied with all the court requirements, dismissed the DUI charge, and found Applicant guilty of reckless driving.<sup>(11)</sup> After the court proceedings, Applicant attended counseling and AA meetings for one more week and stopped his participation on both programs. He stopped attending treatment because "the court said he had

<sup>(12)</sup>

completed the program," and he determined he did not have an alcohol problem. Applicant presented no evidence to show that he successfully completed an alcohol rehabilitation program.

Applicant testified he never stopped drinking alcohol after his 2004 DUI. He infrequently consumed alcoholic beverages after his 2004 DUI and while attending alcohol rehabilitative counseling. (13) He claimed he was never told he could not drink while attending counseling, and that nobody recommended that he not drink - the decision was left up to him. (14) He further testified that, since 1999, the only two times he has ever consumed alcohol to excess were the two times he was charged with DUI; that he never consumed more than five beers in an evening while in college; that he did not drink at his wedding; and that he did not drink in January 2006 while watching the Super Bowl. (15)

When confronted with the fact that one of his witnesses testified he observed Applicant consume four to five beers while participating in a job related training exercise, Applicant claimed the witness was mistaken because he only had two or three beers. (16) He could not explain why he drank beer at a training exercise but not at his wedding, or while watching the Super Bowl. Applicant testified the last time he consumed alcohol was three weeks prior to his hearing. He testified he consumes alcohol (no more than two beers) on an infrequent basis, at home or during social settings.

In August 2004, Applicant's employer, located in another State, mailed back to Applicant the SF 86 that Applicant submitted (signed and dated) in March 2004. Applicant claimed he was only asked to re-sign and date the SF 86 and to mail it back. Applicant complied with the purported instructions and did not update his SF 86. Since March 2004, several things had changed in Applicant's life that made his SF 86 answers not true or accurate, i.e., he married, acquired property, and had a new home address and phone number. More important, he was charged with DUI and was participating in alcohol treatment/counseling.

In his answer to SF 86 question 24, Applicant failed to disclose his March 2004 DUI charge, and in his answer to question 30, he failed to disclose that at the time he submitted the SF 86 he was receiving alcohol related treatment/counseling. Applicant claimed that, because he was recently hired and had no experience in the security clearance process, he was not aware he was supposed to update the SF 86. He also claimed he did not have anyone from his company, or from the government, to assist him with the security application process. For those reasons, Applicant claimed he only complied with his employer's instructions and just re-signed and dated the SF 86 without making any corrections. (17) When asked whether he read the SF 86 certification paragraph before signing and dating the SF 86, Applicant claimed he did not remember reading the certification paragraph. He failed to ensure all his answers to the form were true, complete, and correct as required by the certification that he signed. (18)

After observing Applicant at the hearing, listening to his testimony, and considering his explanations, I find Applicant's testimony evasive, strained, and not convincing. Considering Applicant's testimony in light of all the evidence as a whole, I find Applicant omissions were deliberate and made with the intent to mislead.

### **POLICIES**

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept. (19) Having considered the record evidence as a whole, I conclude Guideline E (Personal Conduct) and Guideline G (Alcohol Consumption), are the applicable relevant adjudicative guidelines.

### **BURDEN OF PROOF**

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information. (20) A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government,

therefore, has a compelling interest to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish, by substantial evidence, <sup>(21)</sup> a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion. <sup>(22)</sup> The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security. <sup>(23)</sup>

## CONCLUSIONS

Under 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. <sup>(24)</sup> The government established its case under Guideline G by showing that in 1999, when he was 22 years old, and in 2004, at age 27, Applicant abused alcohol, resulting in his exercising questionable judgment and being charged with DUI. Guideline G Disqualifying Condition (DC) 1: *Alcohol-related incidents away from work, such as driving while under the influence* <sup>(25)</sup> applies.

Applicant's drinking was addressed through court required alcohol abuse counseling/treatment from June 2004 to January 2005. Although the court considered "the case ended successfully and Applicant met all court requirements," margin notes on a complaint/warrant document are not sufficient to demonstrate that Applicant successfully completed inpatient or outpatient rehabilitation treatment along with aftercare requirements. Nor do the notes establish a favorable diagnosis or prognosis for the Applicant, or that he has no alcohol related problems. Guideline G Mitigating Condition (MC) 4 is not applicable. <sup>(26)</sup>

Applicant's alcohol-related incidents, although five years apart, cannot be considered isolated or aberrational incidents. Applicant's DUI, after his 1999 alcohol-related accident, demonstrates he lacks judgment, and shows he did not learn from his mistakes. Considering Applicant's behavior, as well as his testimony and demeanor, in light of the evidence as a whole, Applicant failed to demonstrate he does not have an alcohol-related problem.

There is no evidence Applicant has been involved in any additional alcohol-related misconduct since 2004. Additionally, he presented evidence that could be considered as changes on behavior supportive of sobriety, i.e., his outstanding job performance, his excellent character testimony, his recent marriage, and his acquisition of property. Notwithstanding, after balancing all available information, Applicant's favorable information is not sufficient to overcome the concerns raised by the two alcohol-related incidents, and his lack of judgment and trustworthiness. Applicant evasiveness, his lack of credibility, and his failure to complete his alcohol rehabilitative treatment and to participate in aftercare counseling prevent a finding that his access to classified information is clearly consistent with the national security. I conclude none of the Guideline G Mitigating Conditions apply.

Under Guideline E, an applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information. <sup>(27)</sup>

The government established its case under Guideline E by showing that Applicant deliberately failed to disclose material information in his answers to his August 2004 SF 86. In light of Applicant's demeanor, his evasive, untrustworthy testimony, and the evidence as a whole, I find Applicant's omissions were made with the intent to mislead. Applicant's claim that he was only asked to re-sign and date the SF 86, makes no sense. I believe Applicant was asked to review and update the form, and then mail it back. Given Applicant's age and education, the detail with which he answered the March 2004 SF 86, and the fact that it seems he was being mentored by D, I conclude Applicant intentionally failed to update the form. Disqualifying Conditions (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .*, <sup>(28)</sup> and DC 4: *Personal*

conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress . . ., (29) apply.

I considered all Guideline E Mitigating Conditions (MC) and conclude that none applies. Applicant is a well-educated 27-year-old man. By all accounts, he is an accomplished individual, respected by both supervisors and clients for his technical and professional skills. Considering the record as a whole, I do not believe Applicant's failure to update the SF 86 can be attributed to ignorance or explained as an honest mistake. Applicant was likely concerned about the negative impact the DUI would have on his security clearance application and elected to omit the adverse information. Applicant's overall behavior does not instill the confidence that he can be trusted to properly safeguard classified information. Additionally, for the same reasons outlined above under the discussion of Guideline G, incorporated herein, I conclude none of the MCs apply. Guideline E is decided against Applicant.

I have carefully weighed all the evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's testimony, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns. Applicant's clearance is denied.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Alcohol Consumption (Guideline G) AGAINST APPLICANT

Subparagraphs 1.a -1.d Against Applicant

Paragraph 2, Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraphs 2.a - 2.b Against 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.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. Appellate exhibit 1 (JPAS documents).
3. Tr. 38.
4. AE 1 - 4.
5. Tr. 147-154.
6. Tr. 189.
7. GE 1.
8. Tr. 154-163.

9. GE 2 (Applicant's January 2005 statement to a government investigator.)
10. GE 2.
11. AE 7.
12. Tr. 175-178.
13. Tr.164.
14. Tr. 175. Applicant's statement is contradicted by the fact he was required to participate on breath analyzer tests every time he attended counseling.
15. Tr. 175.
16. Tr. 177.
17. Tr. 189-191.
18. GE 1, p. 10.
19. Directive, ¶ E2.2.1. "The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
20. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
21. ISCR Case No. 98-0761, at p. 2 (December 27, 1999)(Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199, at p. 3 (April 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
22. *Egan*, 484 U.S. 518, at 528, 531.
23. Directive, ¶ E2.2.2.
24. Directive, ¶ E2.A7.1.1.
25. Directive, ¶ E2.A7.1.2.1.
26. Directive, ¶ E2.A7.1.3.4.
27. Directive, ¶ E2.A5.1.1.
28. Directive, E2.A5.1.2.2.
29. Directive, E2.A5.1.2.4.