

DATE: May 3, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 04-05456

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Candace Le'i, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant engaged in criminal conduct on at least eight separate occasions, from 1991 to 2001. His long history of alcohol abuse has resulted in much of this criminal conduct. Applicant received alcohol abuse treatment from two facilities, but he was not ultimately successful because he did not complete either of the programs, and he has continued consuming alcohol. Mitigation has not been shown. Clearance is denied.

**STATEMENT OF THE CASE**

On September 28, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which detailed reasons 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or granted.

Applicant filed a notarized response dated November 11, 2005, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On January 28, 2005, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice dated January 11, 2006, a hearing was held on February 14, 2006.

At the hearing, Department Counsel offered 19 documentary exhibits (Government's Exhibits 1-19) and no witnesses were called. Applicant offered no documentary exhibits (Applicant's Exhibits A-D) and offered his own testimony. The transcript (Tr) was received on March 1, 2006.

**FINDINGS OF FACT**

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct)

and Guideline G (Alcohol Consumption) of the Directive. The SOR contains 15 allegations, 1.a. through 1.o., under Guideline J, and four allegations, 2. Through 2.d., under Guideline G. Applicant admits SOR allegations 1.a., 1.b., 1.h., 1.i., 1.k., 1.l., 1.m., 1.n., 1.o., 2.c., and 2.d.. The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the live testimony and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 47 years old, married, and he has two children. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

### **Guideline J (Criminal Conduct)**

The Government alleges that Applicant is ineligible for clearance because he has engaged in criminal acts that occurred from 1991 through 2001, and which have been included in the SOR as 1.a. through 1.o. The allegations will be discussed as they were alleged in the SOR:

- a. Applicant was arrested on July 23, 1991, and charged with (1) Driving Under the Influence of Alcohol and (2) Driving With .08% Alcohol or Higher. Applicant was found guilty of Count (1) and granted summary probation for 36 months, was ordered to serve 48 hours in jail, fined \$930.00, and ordered to enroll in a drinking driver's program. Count (2) was dismissed (Exhibits 3, 10, 18).
- b. Applicant was arrested on November 29, 1991, and charged with (1)(2) Causing Great Bodily Injury/Harm, two counts, (3) Inflict Injury on Spouse, and (4) Injure Police Officer. Applicant was found guilty of an added charge of Battery and was sentenced to serve 30 days in jail, ordered to participate in a counseling program, and he was placed on 36 months of unsupervised probation (Exhibits 3, 12, 17).
- c. Applicant was arrested on May 31, 1992, and charged with (1) Driving Under the Influence of Alcohol, (2) Driving With Blood Alcohol Level of .08% or Higher and (3) Evading Arrest. Applicant was found guilty of Counts (1) and (3) and was ordered to serve 40 days in jail, pay a fine of \$1,134.00, serve 48 months of unsupervised probation and complete a drinking driver's program. Count (2) was dismissed (Exhibits 3, 16).
- d. Applicant was arrested on October 23, 1992, and charged with California Driver's License Suspended. He was found guilty and ordered to serve 40 days in jail. He was also awarded 24 months of probation and ordered to pay a fine of \$1,351.00 (Exhibit 15).
- e. A bench warrant for Applicant's arrest was issued on April 6, 1994, after Applicant failed to appear in court for violation of his probation by Driving With a Measurable Amount of Alcohol in Blood (Exhibit 16).
- f. Applicant was arrested on August 22, 1994, and charged with (1) Violation of Probation, (2) Driving Under the Influence of Alcohol or Drugs .08% and (3) Evading. He was found guilty and fined \$957.00 (Exhibits 10, 13).
- g. A bench warrant was issued on January 17, 1995 after Applicant failed to appear in court for violation of probation by Failing to Enroll in and Successfully Complete an Alcohol Program (Exhibit 16).
- h. Applicant was arrested on June 11, 1995, and charged with (1) Driving at Unsafe Speed, (2) Driving With a Suspended License and (3) Unlawfully Possessing Alcohol. He was found guilty of Count (2), and he was placed on one year of unsupervised probation and ordered to serve 10 days in jail. Counts (1) and (3) were dismissed (Exhibit 11).
- i. Applicant was arrested on July 22, 1995, and charged with (1) Driving Under the Influence of Alcohol, (2) Having More Than .08% Blood Alcohol Content, (3) Driving With a Suspended/Revoked License and (4)1(5) Driving With a Suspended License, two counts. Applicant were found guilty of Count (2) and Applicant were ordered to serve 120 days in jail, participate in an 18 month counseling program, pay a fine of \$1,153.00, and install an ignition interlock device. The remaining counts were dismissed. Applicant violated his requirements of probation on January 12, 2000 for Failure to Complete Alcohol Program and Attend Alcoholic's Anonymous meetings. He was ordered to serve an additional 57

days in jail. On October 30, 2000, Applicant was found guilty of another Violation of Probation and was ordered to serve an additional 33 days in jail (Exhibits 4, 7, 9, 10).

j. A bench warrant for Applicant's arrest was issued on July 28, 1995, after Applicant violated his probation. This warrant remains active (Exhibits 16).

k. Applicant was arrested on August 26, 1998, and charged with (1) Driving With a Suspended License, (2) Operating a Vehicle Without an Installed IID and (3) Speeding. He was found guilty of Count (1) and was ordered to serve 360 days in jail, all but 10 days suspended and pay a fine of \$193.00. Applicant was placed on three years of unsupervised probation and ordered to perform 10 hours of community service in lieu of jail time. Counts (2) and (3) were dismissed. On February 4, 2000, Applicant was found guilty of Probation Violation and sentenced to an additional 45 days in jail (Exhibits 4, 7, 8, 9).

l. Applicant was arrested on January 8, 2000, and charged with (1) Driving Under the Influence of Alcohol, (2) Having More Than .08% Blood Alcohol Content While Driving a Vehicle, (3) Driving With a Suspended License and (4) Reckless Driving. He was found guilty of Count (4) and was placed on 36 months of probation. Applicant was also ordered to pay a fine of \$940.00 or in lieu of fine, perform 10 days of community service and complete an 18 month second offender alcohol program. Counts (1) through (3) were dismissed. On December 4, 2000, Applicant were found guilty of Probation Violation and was sentenced to serve 10 days in jail or pay a fine of \$50.00 (Exhibits 4, 6, 12).

m. Applicant were arrested on April 30, 2000, and charged with (1) Driving Under the Influence of Alcohol, (2) Having More Than .08% Blood Alcohol Content While Driving and (3) Driving With a Suspended License. Applicant were found guilty of Count (2) and Applicant was sentenced to 210 days in jail, with 210 days suspended, was placed on five years of summary probation with conditions of serving 360 days in jail, less credit for three days. He also was ordered to participate in an alcohol treatment or counseling program for 30 months and pay fines of \$3,008.00, or in lieu of fine perform 32 days of community service and to pay a fine of \$178.00, or in lieu of fine serve 32 days in jail. Applicant was found guilty of Count (3) and sentenced to serve 330 days in jail, with 330 days suspended. He was placed on summary probation for a period of three years with conditions of serving 360 days in jail, ordered to pay a fine and restitution of \$1,450.00, or in lieu of fine perform 16 days of community service and Applicant were ordered to serve 16 days in jail. Count (1) was dismissed (Exhibits 4, 7, 12).

Applicant was found non-compliant with his alcohol treatment program and a bench warrant was issued on June 4, 2001, in the amount of \$10,000.00. The bench warrant was recalled after Applicant completed his alcohol treatment program.

n. Applicant was arrested on October 26, 2000, and charged with (1) Driving With a Suspended License, (2) Operating a Vehicle Without the Installation of the IID (3) Driving at an Unsafe Speed and (4) No Proof of Car Insurance. He was found guilty of Counts (1) through (3). For Count (1), Applicant was ordered to serve 360 days in jail, placed on three years probation, and fined \$507.00. For Count (2) Applicant was ordered to serve 180 days in jail to run consecutive, and for Count (3), he was fined \$300.00, or in lieu of fine, serve 10 days in jail. Count (4) was dismissed (Exhibits 8, 12)

o. Applicant was arrested on December 18, 2001, and charged with (1) Driving With Suspended License, (2) Driving With Suspended/Revoked License, (3) Driving at an Unsafe Speed, and (4) Not Having Proof of Insurance. The case was dismissed after it was determined that Applicant were driving to attend an 18 month court ordered alcohol treatment program (Exhibit 5).

Applicant denied that allegations 1.c., 1.d., 1.e., 1.f., 1.g., and 1.o., as discussed above, were applicable to him. Applicant has been aware of these allegations since he spoke to an agent of the Defense Security Service in January 28, 2004, and he indicated at that time that he would attempt to contact the proper police departments and a public defender to resolve these incorrect allegations. At the hearing, he was unable to introduce any evidence to show that these allegations did not involve him. He also testified that these criminal acts may have been committed by his nephew, because he had his driver's license number. However, he conceded that his nephew never actually had Applicant's driver's license, and Applicant was in his forties while his nephew was in his teens, during these events. As a result, I do not find credible Applicant's explanation that he was not involved.

Applicant also testified that he never completed a court ordered alcohol treatment program. **Guideline E (Alcohol Consumption)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses alcohol to excess.

a. Applicant consumed alcohol, at times to excess and to the point of intoxication, from approximately 1985. Applicant continues to consume alcohol.

b. That information as set forth in subparagraphs l.a., l.c., l.e., l.f., l.h., l.i., and l.m. above.

c. Applicant attended an alcohol education school in about August 1991. Applicant did not complete his attendance at that program.

d. Applicant attended alcohol counseling from August 2, 1999 to January 24, 2000 and from September 20, 2001 to March 6, 2002. Applicant also did not complete his attendance at that program.

Applicant went through a treatment program in 1991, which advised him to abstain from alcohol consumption, but he drank after attending the program. He attended a second program in 1999, but he has never completed that program. Until the hearing, Applicant consumed alcohol and had no intention to stop consuming alcohol in the future.

At the hearing Applicant testified that, based on the questions asked of him by Department Counsel, he now realizes that alcohol consumption can cause problems, and he now intends to abstain from imbibing in the future. The fact that Applicant has served approximately two years in prison, by his own admission, as a result of his alcohol-related convictions, and he only now decided to stop consuming alcohol makes his stated intention less than credible. I find that it is far too soon to conclude that Applicant will be able to abstain from alcohol in the future.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. 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, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

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.

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).

## **BURDEN OF PROOF**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is

nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

### **CONCLUSIONS**

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following:

#### **Guideline J (Criminal Conduct)**

The Government has established by substantial evidence that Applicant's conduct, which occurred from 1991 until 2001, and which is the basis for allegations 1.a. through 1.o. of the SOR, is criminal.

Under Guideline J, I conclude that Disqualifying Conditions (DC) (E2.A10.1.2.1.), Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and DC (E2.A10.1.2.2.), a single serious crime or multiple lesser offenses, apply because Applicant's conduct did involve eight serious criminal offenses over a period of at least 10 years. Applicant failed to offer any significant evidence to rebut the Government's case regarding his criminal conduct. During the hearing, Applicant gave inconsistent and sometimes contradictory explanations of how these events occurred. I find that his entire testimony was less than credible.

While an argument may be made that the criminal behavior was not recent, I find that based on the history and seriousness of Applicant's conduct, it is too soon to make that finding, and therefore, no Mitigating Condition (MC) applies. I resolve Guideline J against Applicant.

#### **(Guideline G - Alcohol Consumption)**

Applicant has had a long history of consuming alcohol to excess. He has had seven alcohol related arrests from 1991 until at least 2000.

The Government established, by substantial evidence, that Applicant was involved in alcohol-related incidents away from work, such as driving under the influence, which is Disqualifying Condition (DC) (E2.A7.1.2.1.). It has also been established by substantial evidence that Applicant has engaged in habitual or binge consumption of alcohol to the point of impaired judgment which is which is DC (E2.A7.1.2.5.).

MC (E2.A7.1.3.2.) could be argued to apply, because Applicant has not been arrested for an alcohol related incident since 2000. However, since he has had a long history of consuming alcohol and then becoming involved in alcohol-related incidents, and he has continued to consume alcohol until the time of the hearing, I find that this MC does not yet apply. I also do not find that any other C applies to this Applicant. Guideline G is concluded against Applicant.

### **FORMAL FINDINGS**

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

#### **Paragraph 1. Guideline J: AGAINST APPLICANT**

Subparagraph 1. a.: Against Applicant

Subparagraph 1. b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Subparagraph 1.m.: Against Applicant

Subparagraph 1.n.: Against Applicant

Subparagraph 1.o.: Against Applicant

**Paragraph 2. Guideline G: AGAINST APPLICANT**

Subparagraph 2. a.: Against Applicant

Subparagraph 2. b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: 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.

Martin H. Mogul

Administrative Judge