

DATE: March 1, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-08623

**AMENDED DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Esquire, Department Counsel

**FOR APPLICANT**

Richard S. Thompson, Esquire

**SYNOPSIS**

Applicant was charged with alcohol related offenses on four occasions between 1983 and 2003, the last resulting in a conviction for driving under the influence of alcohol on May 27, 2004. He has failed to mitigate the security concerns that arise from his alcohol consumption. 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 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 a security concern under Guideline G, concerning alcohol consumption. Applicant submitted an answer to the SOR that was received by DOHA on November 5, 2004, requested a hearing, and, while admitting some of the factual allegations made in the SOR, denied any SOR allegation created a security concern.

The case was assigned to me on January 13, 2005. A notice of hearing was issued on January 21, 2005, scheduling the hearing for February 4, 2005. <sup>(2)</sup> The hearing was conducted as scheduled. The government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6, and admitted into the record without objection. Applicant testified, called his wife to testify on his behalf, and submitted seven documentary exhibits that were marked as Applicant's Exhibits (AE) 1-7, and admitted into the record without objection. The transcript was received on February 15, 2005.

**PROCEDURAL MATTERS**

Department Counsel moved to amend the SOR to change the date of the arrest alleged in SOR subparagraph 1.d. from "on July 6, 1995" to "on or about July 6, 1992." Applicant joined in the motion. The motion was granted and the amendment was made on the face of the document.

## FINDINGS OF FACT

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

Applicant is 54 years old, and has been married since September 1983. He was previously married in November 1969, and that marriage ended in divorce in April 1981. Applicant has three daughters, ages 34, 19, and 17. He graduated from high school in June 1968, and obtained an associate degree in June 1985. Applicant served in the Army Reserve from December 1969 until December 1975.

Applicant was employed as a firefighter for 11 years, and as a sales representative for seven years, until he started his own chemical business in February 1988. He sold that business in September 1995, and spent the next two years engaged in leisure activities and managing real estate holdings he had acquired. He started a trucking business in June 1997 that has grown and evolved into a logistics company employing approximately 120 people in a variety of endeavors throughout the southeastern United States. He is the president and 90% shareholder of the company, and is seeking a security clearance so the company can perform under Department of Defense contracts.

On March 15, 1983, Applicant went to dinner with his sister and brother-in-law, and consumed what he believed was too much alcohol to permit him to safely operate a motor vehicle. Accordingly, his sister drove him home, while his brother-in-law drove Applicant's car. The brother-in-law was stopped at a police checkpoint a couple of hundred yards from Applicant's home, and was arrested for driving under the influence. Applicant walked back to the checkpoint to determine what had happened to his brother-in-law, and he was then arrested and charged with Drunkenness and Permitting One Drive Vehicle Unlawfully [sic].<sup>(3)</sup> Applicant pled guilty to both charges on June 17, 1983 and was fined \$55.00.

Applicant was charged with Driving Under the Influence (DUI) on December 18, 1984. He testified he had a drink at home with dinner and then went out to meet with a customer. He was acquitted of this charge.

Applicant was charged with DUI in July 1992. He had consumed alcohol at a retirement party, and, while driving to another city, felt tired, pulled to the side of the road, turned off the car, and fell asleep. A police officer found him sleeping in the vehicle and arrested him for the DUI. Although there is no evidence what offense he was convicted of, Applicant candidly testified he does recall having to pay a fine of a couple hundred dollars.

Applicant was again charged with DUI in December 2003. He had consumed alcohol while playing golf with friends, and was thereafter involved in an automobile accident when someone drove into the rear of his car as he was turning into the driveway of his office. He pled guilty in May 2004, and was placed on 12 months probation, fined \$600.00 plus \$140.00 in surcharges, ordered to serve 48 hours in jail, perform 40 hours community service work, and attend an alcohol education program. He has successfully completed all terms of probation.

Applicant and his wife both testified he only consumes alcohol on social occasions and occasionally at home. He has never been diagnosed as having an alcohol problem, and has not sought any treatment other than in connection with the 2004 conviction. He testified the various penalties imposed as part of the 2004 conviction were a humbling learning experience for him, and that he will never again consume alcohol and drive a vehicle.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline G, pertaining to alcohol consumption, with its respective DC and MC, is most relevant in this case.

## BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(6)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</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>(9)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

No one has a right to a security clearance<sup>(11)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(13)</sup>

## CONCLUSIONS

Under Guideline G, alcohol consumption is a security concern because 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. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication may affect an individual's ability to exercise the care, judgment, and discretion necessary to protect classified information.

Applicant has been charged with alcohol related offenses four times since 1983. He was convicted and required to pay fines in 1983 and 1992, received a much harsher sentence following his May 2004 conviction, and remains on probation at present. Disqualifying Conditions (DC) 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* applies.

Although Applicant's alcohol related offenses span a 20-year time period, they are indicative of a recurring pattern of using alcohol to excess, and thereafter engaging in illegal conduct. Applicant was subjected to criminal proceedings in 1983 and 1992 for alcohol related offenses, had fines imposed on each occasion, and still chose to drive a car after consuming alcohol as recently as December 2003. Accordingly, Mitigating Condition (MC) 1: *The alcohol related incidents do not indicate a pattern* does not apply.

Applicant testified to the positive effect spending time in jail and attending an alcohol education program has had on him. He has never engaged in binge drinking or frequent over consumption of alcohol. He did not consume any alcohol for eight to ten months after his arrest, but has now resumed drinking in social settings and occasionally at home. However, only 14 months have passed since his last arrest, and a mere nine months since his conviction. He is scheduled to remain on probation for another three months. Considering the recency of the DUI conviction, and Applicant's resumption of alcohol consumption following three alcohol related criminal incidents, albeit spaced over 20 years, MC (3): *Positive changes in behavior supportive of sobriety* does not apply.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Considering all relevant and material facts and circumstances present in this case, the whole person concept, including Applicant's business accomplishments, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guideline G is decided against Applicant.

## FORMAL FINDINGS

SOR ¶ 1-Guideline G: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: For Applicant

Subparagraph d: Against Applicant

Subparagraph e: 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant waived the 15-day notice requirement on the record.
3. GE 6 lists the dates of these two offenses as March 15, 1983 and February 15, 1983 respectively. However, it is clear from the testimony they actually occurred on the same date and reflect a single incident.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
11. *Egan*, 484 U.S. at 528, 531.
12. *Id* at 531.
13. *Egan*, Executive Order 10865, and the Directive.