

DATE: August 24, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-10168

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Nichole Noel, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has four alcohol-related convictions, is presently on probation for driving under the influence of alcohol (DUI), and has a pending DUI charge. Clearance is denied.

**STATEMENT OF THE CASE**

On July 12, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 Guideline G (alcohol consumption), Guideline J (criminal conduct), and Guideline E (personal conduct). Applicant submitted an incomplete answer to the SOR that was received by DOHA on August 31, 2005, and a complete answer to the SOR that was received by DOHA on September 23, 2005. Applicant admitted all SOR allegations except subparagraphs 1.f, 3.a, and 3.b, and requested a hearing.

The case was assigned to me on February 17, 2006. A notice of hearing was issued on February 27, 2006, scheduling the hearing for March 23, 2006. The hearing was conducted as scheduled. The government submitted 20 documentary exhibits that were marked as Government Exhibits (GE) 1-20. GE 1-3 and GE 5-20 were admitted into the record without objection. The government was granted permission to withdraw GE 4 prior to admission into the record. Applicant testified, called one witness to testify on his behalf, and submitted 12 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-12, and admitted into the record without objection. The transcript was received on April 7, 2006.

**FINDINGS OF FACT**

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

Applicant is a 53-year-old man who has been employed under contracts awarded to various defense contractors since June 1990. Initially hired as an avionics technician, he was promoted to the position of maintenance supervisor in May 1995. He served on active duty in the U.S. Navy from January 1986 until January 1989, and in the active Navy reserve from April 1990 until October 1993. He attained the rank of petty officer second class (paygrade E-5) and was awarded an honorable discharge. Applicant completed college in 1998 and was awarded a Bachelor of Science degree in professional aeronautics.

Applicant was married in January 1972, obtained a divorce in January 1980, and has two adult children from that marriage. He remarried in April 1988, and that marriage ended in divorce in April 1992. Applicant has now been remarried since May 1993. He has two stepchildren, ages 23 and 16.

Applicant admittedly has had an alcohol problem since he was a teenager. He was charged with reckless conduct, destruction of property, and illegal use of weapon in October 1982, after he fired shots through a window of a former supervisor's house. He had consumed alcohol prior to the incident. He was convicted, placed on probation, and fined.

Applicant was convicted of driving under the influence of alcohol (DUI) in May 1987. He was placed on probation, fined, and ordered to perform community service work.

Applicant was charged with disorderly intoxication and breach of the peace in August 1991, following a public domestic dispute with his wife. He informed the arresting officer he had consumed five beers before the incident, and in the arresting officer's opinion he was intoxicated (GE 9). Applicant pled guilty to breach of the peace, adjudication was withheld, and he was fined \$250.00.

He was again charged with DUI in March 2003. He was convicted of this offense in October 2005, placed on one year probation, assessed a fine and court costs totaling \$1,000.00, ordered to attend an alcohol awareness program, and had his license suspended for six months. Applicant was once again charged with DUI in April 2005. This charge is still pending, however, Applicant informed his employer he was driving a motor vehicle when arrested and his blood alcohol content (BAC) at the time was 0.185 (GE 8).

In a statement provided to an agent of the Defense Investigative Service (DIS) in July 1988, Applicant acknowledged he had a drinking problem while a teenager, again in the last few years of his first marriage, that the problem had become serious by 1981, and that he had been consuming eight to twelve beers a day until three months before he provided the statement (GE 6). He attended about four counseling sessions at a mental health facility in 1985 at the urging of a woman whose father was an alcoholic, but stopped attending because he could not relate to what the counselor was telling him (GE 6). He attended a Navy alcohol program following his 1987 DUI conviction and decided to totally abstain from alcohol in or about April 1988 (GE 6).

Applicant provided a statement to an agent of the Defense Security Service in August 2003 in which he claimed to have abstained from consuming alcohol since his March 2003 DUI arrest (GE 5). He acknowledged consuming about a six-pack of beer each evening prior to that arrest and that he had attended some Alcoholic's Anonymous (AA) meetings with his wife in about 1993 (GE 5). Applicant averred at that time that he intended to continue to abstain from consuming alcohol in the future (GE 5).

Applicant remained in jail for five days following his April 2005 arrest. During that time he came to a realization of the destructive effect alcohol was having on his life. Following his release from custody, he attended AA meetings for 42 consecutive days. He completed a 21-day inpatient treatment program on July 3, 2005, and a 14-day follow-up outpatient program on July 22, 2005. His prognosis on discharge from the outpatient program was "above average" (AE 4). Applicant attended five sessions with a psychologist from August 15, 2005, to October 31, 2005, and his prognosis for continued recovery was deemed to be "good" (AE 5). He completed a state mandated 21 hour alcohol substance abuse education course and an evaluation assessment that was required as a result of his 2003 DUI arrest on November 20, 2005 (AE 6). He was not referred for further counseling by the state. The record does not contain any evidence of a diagnosis having been made from any of the treatment programs attended by Applicant.

Applicant has continued to regularly and frequently attend AA meetings since completion of the several alcohol

programs he attended. He has had an AA sponsor since May 2005, and is faithfully working the 12-step program. Applicant's sponsor has observed "tremendous growth" since Applicant has been attending AA meetings, and believes that if Applicant "continues on this path his chances for a lifetime of sobriety are excellent" (AE 7).

Applicant submitted the testimony of his wife, and letters from coworkers, friends, his stepson and his mother-in-law. Those persons speak very highly of him and of his reputation for being honest, trustworthy, and sincere in his desire to remain abstinent from alcohol.

Applicant freely and voluntarily disclosed his 2003 and 2005 DUI arrests to his employer when they occurred, as was required of him as a security clearance holder. However, he failed to list his 1982 and 1991 arrests in response to applicable questions asked of him in a security clearance application (SF 86) he submitted in March 2003. He has explained that he either misread the questions or did not consider those arrests to be alcohol related. Considering the extremely adverse information he timely and voluntarily disclosed, his explanations for failing to list those arrests are credible.

### **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 (alcohol consumption), Guideline J (criminal conduct), and Guideline E (personal conduct), with their respective DC and MC, are 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>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</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>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</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>(11)</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 admittedly has had an alcohol abuse problem since he was a teenager. His abuse of alcohol has either directly caused or contributed to five situations that have resulted in arrests and/or convictions. He is presently on probation for a DUI and has a DUI charge pending. He has undergone alcohol abuse treatment or counseling on numerous occasions between 1985 and 2005. 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; and DC 5: Habitual . . . consumption of alcohol to the point of impaired judgment apply.*

There is no doubt that Applicant is aggressively and earnestly working to overcome his alcohol abuse problem. To that end, he has recently completed inpatient and outpatient treatment, consulted a psychologist, and completed a state mandated program. He frequently and regularly attends AA meetings, has obtained a sponsor, and is working the 12-step program. Those who know him well agree he is committed to maintaining an alcohol-free lifestyle.

Applicant's commitment to sobriety, his outstanding efforts to overcome his alcohol problem, and the favorable prognoses he received from a counselor, a psychologist, and his AA sponsor entitle him to full credit under Mitigating Condition (MC) 3: *Positive changes in behavior supportive of sobriety*. Still, I cannot find with any degree of certainty that Applicant will remain sober in the future.

Applicant has undergone treatment and/or attended counseling sessions in the past. He has on prior occasions asserted he would remain abstinent from alcohol. Further, Applicant is presently on probation for a DUI and has another DUI charge pending. Whether he will successfully complete probation and what the outcome of the other case will be are, of course, unknown. What effect the ultimate disposition of those cases may or may not have on his effort to remain sober is likewise unknown. Considering Applicant's long history of alcohol abuse and his failed prior efforts to overcome his abuse problems, it is much too soon to be able to safely predict he will not suffer a relapse. Guideline G is decided against Applicant.

Under 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.

Applicant has been convicted of three alcohol-related offenses, had adjudication withheld following a plea of guilty to a fourth alcohol related offense, and has a DUI charge pending in which the record substantiates finding he committed the offense. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply. For the same reasons discussed under Guideline G, I find no mitigating condition exists. Guideline J is decided against Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's explanations for not listing his 1982 and 1991 arrests in the SF 86 he submitted, considering the unfavorable information he voluntarily disclosed to his employer, are credible. No disqualifying condition exists and Guideline E is decided for Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has failed to mitigate the security concern caused by his alcohol consumption and criminal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline G: Against Applicant

Subparagraphs a-f: Against Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraph a: Against Applicant

SOR ¶ 3-Guideline E: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For 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. <sup>0</sup> This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. <sup>0</sup> ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. <sup>0</sup> ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. <sup>0</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. <sup>0</sup> ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. <sup>0</sup> ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. <sup>0</sup> ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. <sup>0</sup> ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. <sup>0</sup> *Egan*, 484 U.S. at 528, 531.
10. <sup>0</sup> *Id* at 531.
11. <sup>0</sup> *Egan*, Executive Order 10865, and the Directive.