

DATE: February 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-02116

## **DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Stephanie Hess, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 47 years old and works as an audio-visual technician for a defense contractor. In 1999 she was convicted of Driving Under the Influence of Alcohol, and in 2003 of Driving While Intoxicated. Since the last conviction, she has not been involved in any alcohol related incidents, has participated in an extensive alcohol rehabilitation program, and has limited her drinking considerably. Applicant mitigated the security concerns related to her criminal conduct and alcohol consumption. Clearance is granted.

### **STATEMENT OF THE CASE**

On August 9, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guidelines J (Criminal Conduct) and G (Alcohol Consumption) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On August 29, 2005, Applicant filed her Answer to the SOR. She admitted all of the allegations and requested a hearing. The case was assigned to an administrative judge on December 7, 2005, and reassigned to me on December 8, 2005. A Notice of Hearing was issued on December 22, 2005, and the hearing was held on January 18, 2006. At the hearing the Government introduced Exhibits (GX) 1-9 into evidence. Applicant introduced 22 exhibits that were marked as Applicant Exhibits (AX) A-V. Applicant testified and called three witnesses. DOHA received the Transcript (Tr.) on January 26, 2006.

### **FINDINGS OF FACT**

Applicant's admissions in her Answer to the SOR and at the hearing are incorporated into my findings of fact. I make

the following findings of fact:

Applicant is 47 years old. Since September 2001, she has worked as an audio-visual specialist for a defense contractor. (1)

On December 19, 1999, Applicant was arrested and charged with (1) Driving Under the Influence of Alcohol, and (2) Driving a Vehicle at Unsafe Speed, misdemeanors. On April 18, 2000, she was found guilty of Count (1), and Count (2) was withdrawn. She received a suspended one year jail sentence, paid a fine and court costs of \$1,289.00, and was placed on Accelerated Rehabilitative Disposition Fast Track Program and supervised probation for one year. She was also ordered to complete an alcohol Highway Safe Driving School, which included an alcohol evaluation and education classes. Her driver's license was suspended for 120 days. (2) Prior to the arrest Applicant had been Christmas shopping with a friend and had stopped for a couple drinks before going home. (3)

On November 29, 2000, the court entered an order discharging Applicant from the Accelerated Rehabilitative Disposition Fast Track Program, and dismissing the criminal charges. This order disposed of the matter approximately six months earlier than initially anticipated. (4) As part of the rehabilitation program she attended approximately twelve to sixteen classes related to alcohol education. (5)

On January 18, 2003, Applicant was arrested and taken to jail overnight. She was charged with Driving While Intoxicated, First Offense, a misdemeanor. On April 30, 2003, she pleaded guilty to Driving While Intoxicated. She received a suspended 30-day jail sentence, and paid \$67.00 in court costs and a \$600.00 fine, with \$300.00 suspended. She was required to attend a state Alcohol Safety Action Program (ASAP), and was placed on supervised probation for one year. Her driver's license was suspended for 12 months. (6) This arrest occurred after she attended a holiday work party. (7)

While on supervised probation, Applicant was required to refrain from drinking for one year and was subject to random breathalyzer tests to confirm her sobriety. (8) As part of the alcohol treatment program, Applicant attended weekly Alcohol Anonymous meetings for six months, and participated in ten individual counseling sessions. (9) On January 15, 2004, her probation counselor placed her case on inactive status because she had successfully completed all of the ASAP requirements. (10) On April 30, 2004, the court-imposed probation was terminated. (11)

Although Applicant has been convicted of two alcohol related crimes, she has not been diagnosed as having an alcohol problem during her rehabilitation programs. (12) Presently she drinks minimally. Since being released from probation, she has consumed alcoholic beverages on three separate occasions: once while her nephew was visiting her home, once at dinner before a hockey game in early December, and once at Christmas time in 2005. (13) She does not drink and drive. (14) She is aware of the seriousness of the previous alcohol-related charges and the impact they have had on her job. (15) She admits she did not learn a lesson after the 1999 incident, but did in January 2003, especially after spending the night in jail. She said, "I realize what it was like to have my freedom taken away from me . . . The fact that it was extremely expensive. And most of all, the reason that we're here right now, because it could cost me everything I've worked for." (16) Since January 2003, she has not encountered any legal problems, driving offenses, or other criminal actions related to alcohol or drugs. Applicant expressed remorse and embarrassment over the incidents. She is committed to never repeating the misconduct.

Three of Applicant's supervisors testified, all of whom hold security clearances. They have known her for about three years and have never observed her drinking or engaging in behaviors related to alcohol. They consider her to be a reliable, trustworthy and hard-working employee. (17) Numerous work performance evaluations, recommendations, accolades, and certificates of completion for various courses verify her supervisors' opinions. (18)

## POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*,

sets forth criteria that must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.<sup>(19)</sup> The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty.<sup>(20)</sup> Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.<sup>(21)</sup> The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability.<sup>(22)</sup>

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government.<sup>(23)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance."<sup>(24)</sup>

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

**Guideline J - Criminal Conduct:** A security concern arises when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

**Guideline G - Alcohol Consumption:** A security concern arises 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.

The pertinent disqualifying conditions (DC) and mitigating conditions (MC) under the Guidelines are set forth and discussed in the Conclusions section below.

## CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and the application of the appropriate legal standards, I conclude the following with respect to the allegations set forth in the SOR:

**Guideline J: Criminal Conduct**

The Government established its case under Guideline J. Based on the evidence and Applicant's admissions that she was convicted of two misdemeanor crimes, Criminal Conduct Disqualifying Condition (CC DC) E2. A10.1.2.1 (*Allegations or admission 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 offenses*) apply. However, Applicant successfully completed her second alcohol treatment program in January 2004, which involved more extensive participation in alcohol treatment than the first program, and had her probation terminated two years ago, such that Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) apply. Applicant has sufficiently mitigated the security concerns raised by her previous criminal conduct. Accordingly, Guideline J is decided in favor of Applicant.

#### Guideline G: Alcohol Consumption

The government established its case under Guideline G. Based on the evidence Alcohol Consumption Disqualifying Condition (AC DC) E2.A7.1.2.1 (*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. Applicant admitted she was arrested and charged in 1999 and 2003 with crimes involving the misuse of alcohol, both of which occurred as the result of her intoxication.

I considered all of the mitigating conditions under Guideline G, especially Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*), and conclude it applies. In addition to being remorseful and embarrassed about her past behavior, Applicant expressed an appreciation of the consequences associated with the abuse of alcohol that she learned through her encounters with the criminal justice system. As a result she has reduced her drinking considerably, and is committed to never drinking and driving. That evidence, along with the successful completion of an eight-month alcohol treatment program, the absence of a diagnosis of alcoholism, supportive testimony from three employers, and the passage of three years without incident, sufficiently mitigate the security concerns related to alcohol consumption. Accordingly, Guideline G is concluded for Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

### **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 as follows:

#### Paragraph 1: Guideline J (Criminal Conduct) FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

#### Paragraph 2: Guideline G (Alcohol Consumption) FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance to Applicant. Clearance is granted.

Shari Dam

Administrative Judge

1. GX 1 at 1.

2. Answer to SOR.
3. Tr. 29.
4. GX at 6.
5. Tr. 47.
6. Answer to SOR.
7. Tr. 30.
8. Tr. 49 and 52 .
9. Tr. 49-50.
10. AX V.
11. Tr. 57.
12. Tr. 49 and 51.
13. Tr. 43 and 58.
14. Tr. 42.
15. Tr. 44.
16. Tr. 44.
17. Tr. 62-81.
18. AX A-U.
19. Directive, Enclosure 2, ¶ E2.2.2.
20. Executive Order 10865, § 7.
21. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
22. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).
23. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15.
24. *Id.*