

DATE: January 16, 2007

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-03452

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Emilio Jaksetic, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has continued to consume alcohol, at times to the point of intoxication, despite being diagnosed as alcohol dependent in 1994. His alcohol consumption since 1989 has also led to several criminal charges, including a driving under the influence charge as recently as the month before his hearing in this matter. Clearance is denied.

**STATEMENT OF THE CASE**

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to give Applicant a security clearance. On August 11, 2005, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline G (alcohol), and Guideline J (criminal conduct). Applicant timely answered the SOR, and requested a hearing.

The case was assigned to another administrative judge on May 25, 2006, but transferred to me on June 9, 2006, and I convened a hearing on August 3, 2006. The parties appeared as scheduled, and Department Counsel presented 14 exhibits (Gx. 1 - 14) in support of the SOR. Applicant testified and submitted two exhibits (Ax A and B). DOHA received the transcript (Tr) on August 14, 2006.

**FINDINGS OF FACT**

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 36-year-old field engineer employed by a defense contractor for work in support of U.S. Navy combat weapons systems development and training. He served in the U.S. Navy as an Operations Specialist (OS) from January 1989 until he was honorably discharged in June 1997. A few months after he left the Navy, Applicant was hired by his current employer. He has held at least a secret-level clearance since he joined the Navy. On June 26, 2004, he submitted

a security clearance application (SF 86) to begin a periodic reinvestigation of his suitability to hold a security clearance.

Applicant has been married twice. The first marriage began in June 1991 and ended through divorce in May 2000 after a seven-year separation. They had one child, now 14 years old, for whom Applicant still pays child support. Applicant remarried in 2001. He and his second wife live with her 14-year-old child and have a five-year-old child of their own.

In September 1993, Applicant was charged with spousal abuse after an altercation with his ex-wife. The charge was later dismissed. However, in October 1993, Applicant was charged and later convicted of assault on a female after another altercation with his ex-wife. He was given a suspended 120-day jail sentence, fined, and placed on probation for two years.

Applicant first drank alcohol to excess when he was 16 years old and he consumed 13 or 14 beers with some of his friends. In 1989, then age 19 and a junior enlisted man in the Navy, Applicant and some shipmates were drinking beers in public. When the police approached them, Applicant produced an identification card he had used to buy beer. He was convicted at Captain's Mast (Article 15) of public intoxication, failure to obey a lawful written order, and wrongfully possessing someone else's military identification card. His punishment included a \$100 fine, extra duty, and restriction to his command.

Applicant has been arrested and charged with alcohol-related driving offenses five times. In January 1994, he had consumed enough alcohol to fail a breathalyzer test after being pulled over by the police, and was charged with driving under the influence (DUI). He was later found guilty of a lesser charge of reckless driving and fined. After this incident, Applicant was ordered to complete a Navy drug and alcohol safety awareness course, which he did in February 1994.

In April 1994, Applicant was charged and convicted of driving while impaired (DWI) by alcohol. He was given a 30-day suspended jail sentence, assessed a fine and court costs, placed on two years' probation, and his driving privileges were suspended for one year. In June 1994, in a different state, Applicant was arrested and convicted of DUI. A six-month jail sentence was suspended in favor of probation, he was fined, and his license again suspended. (2) He was counseled by his chain of command about this incident in September 1994.

In July 1994, Applicant and a friend had been drinking while playing golf at the course on their Navy duty station. They damaged course property, and were abusive toward the staff and other golfers. Applicant was counseled by his chain of command about this incident in August 1994.

Applicant has asserted that his abuse of alcohol was his way of dealing with the breakup of his first marriage and subsequent disputes over custody of their child. In July 1994, Applicant was evaluated by a Navy substance abuse counselor and was diagnosed as being alcohol dependent. Also, the evaluators involved expressed their concern that Applicant was minimizing the scope of his alcohol use. (3) Applicant was sent to a 30-day in-patient alcohol treatment program, from which he was discharged with an aftercare plan whereby he was to abstain from alcohol for the balance of his enlistment. Within a few months of completing the in-patient treatment in late 1994, he began drinking again. (4)

In January 1997, the Navy issued Applicant a letter indicating its intent to revoke his security clearance because of his abuse of alcohol and his criminal conduct. (5) The record does not reflect an ultimate outcome of this action; however, it appears Applicant was able to satisfactorily address the Navy's concerns and he was allowed to keep his clearance.

Applicant was arrested and charged with DUI in October 2003. The charge was eventually dismissed, but Applicant admits he drank between 10 and 12 beers before getting behind the wheel. (6)

In a statement to government investigators during his most recent background investigation, Applicant claimed he had become more mature owing to his increased responsibilities at home and at work. He characterized himself as a social drinker who consumes only in moderation on weekends, and that he was more careful about drinking and driving. (7) However, at his hearing, Applicant disclosed he had been arrested in an adjoining state for DUI, admitted he had failed a breathalyzer, and was awaiting a court date on that charge. He had been drinking at a softball game, after which he, his wife, and a friend decided to go to a club. Applicant decided to drive because his wife and friend were intoxicated. (8)

While still in the Navy, Applicant was also charged with three other criminal offenses. In September 1993, he and some friends went to a party to which they had not been invited. Applicant admits he probably had been drinking that evening. The police were called and found Applicant and his friends lurking in the vicinity of the party. Applicant was charged with loitering and prowling, for which he forfeited a \$110 bond when he failed to appear for his court date.

In 1995, Applicant was charged by Navy authorities with rape, but the charge was dismissed with prejudice after a preliminary hearing. In June 1996, Applicant was tried at court martial for rape, sodomy, indecent assault, and perjury. He was acquitted of all charges after a full trial.

Applicant's performance evaluations from his military service reflect a modest record suggestive of chronic underachievement. However, his civilian work record has been superior and he has been recognized for his work on several occasions.

### **POLICIES AND BURDEN OF PROOF**

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(9)</sup> for an applicant to receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for an applicant to have access to classified information. The applicant must then present sufficient evidence to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, applicants bear a heavy burden of persuasion to comply with the government's compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.<sup>(10)</sup> The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>(11)</sup>

The Directive sets forth adjudicative guidelines<sup>(12)</sup> for consideration when evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of disqualifying and mitigating conditions listed under each adjudicative guideline as may be applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline G (alcohol) and Guideline J (criminal conduct).

### **CONCLUSIONS**

**Alcohol Consumption.** The government alleged, as part of its basis for denying Applicant's request for clearance, that he consumed alcohol, at times to excess and to the point of intoxication, from 1989 to at least October 2004 (SOR ¶ 1.a); that he received non-judicial punishment in the Navy for alcohol-related misconduct in 1989 (SOR ¶ 1.b); that he was arrested for driving under the influence or while impaired by alcohol in three times in 1994 (SOR ¶¶ 1.c, 1.e, and 1.f), once in 2003 (SOR ¶ 1.h), and most recently in July 2006 (SOR ¶ 1.j).<sup>(13)</sup> The government further alleged Applicant completed a Navy alcohol awareness program in February 1994 (SOR ¶ 1.d); that he was diagnosed by Navy drug and alcohol counselors in July 1994 and diagnosed as alcohol dependent (SOR ¶ 1.g); and that he has continued to drink despite said diagnosis (SOR ¶ 1.i). Applicant admitted with some explanation each of these allegations. The government's exhibits and Applicant's testimony further support the SOR allegations, although the counseling Applicant received in February 1994 was not treatment in the same sense as the treatment he received in late 1994. Available information is sufficient to support the government's decision to revoke Applicant's clearance based on security concerns about his drinking. Specifically, as addressed in the Directive under Guideline G, 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>(14)</sup> Specifically, these facts

support application of disqualifying condition (DC) 1, DC 3, and DC 5. [\(15\)](#)

By contrast, concerns about alcohol consumption may be mitigated if it can be shown the alcohol-related incidents are not recent, do not reflect a pattern of abuse or excess, there are positive changes in support of sobriety, or the person has completed a course of clinical treatment and has been sober for more than 12 months. [\(16\)](#) None of these factors is present in the information Applicant presented in response to the government's case. Indeed, Applicant's alcohol-related problems have continued into the past year. He further exhibits little insight into the problems alcohol has caused him since 1989. While he claims his alcohol use was only a problem relative to the break up of his first marriage, he was already abusing alcohol when he was a teenager. Applicant has continued to experience alcohol-related problems over the 13 years since he and his first wife separated, including two incidents in the five years since he re-married. In light of all the available information on this issue, I conclude Applicant has failed to mitigate the government's concerns about his alcohol consumption.

**Criminal Conduct.** The government also declined to grant Applicant a security clearance based, in part, on the criminal ramifications of his alcohol-related conduct (SOR ¶ 2.f); [\(17\)](#) and on the allegations that he was charged and fined for loitering and prowling in 1993 (SOR ¶ 2.a); that he was charged with spouse abuse in 1993 (SOR ¶ 2.b); that he was charged and convicted of assault on a female in 1993 (SOR ¶ 2.c); that he was charged with rape in 1995 (SOR ¶ 2.d); and that he was charged and found not guilty by court martial of rape, sodomy, indecent assault, and perjury in 1996 (SOR ¶ 2.e).

As to SOR ¶ 2.b, based on available information, which includes a letter from Applicant's ex-wife, who was the alleged victim, and the subsequent dismissal of the charge, I conclude this event did not occur, and I find for Applicant as to this allegation. Further, as to SOR ¶ 2.d, the felony charge was dismissed with prejudice after a preliminary hearing. Finally, Applicant was acquitted at trial of all charges listed in SOR ¶ 2.e. In giving full weight to the judicial findings regarding these charges, I find for Applicant as to these allegations.

Nonetheless, the government has presented sufficient information to support the remaining allegations of criminal conduct listed in SOR ¶¶ 2.a, 2.c, and 2.f as reasons for denial of Applicant's request for a security clearance. The government's information raises security concerns addressed in the Directive under Guideline J. A person who is willing to disregard the law may also be willing to disregard procedures and safeguards intended to protect classified information from unauthorized disclosure. A person who is willing to disregard the law may also not possess the requisite judgment, reliability, and trustworthiness expected of one in whom the government trusts its national interests. [\(18\)](#) Specifically, Guideline J DC 1 and DC 2 [\(19\)](#) apply here.

The security concerns about criminal conduct may be mitigated if it can be shown the conduct was not recent, was isolated, was the result of external pressures or coercion, was not voluntary, the Applicant was acquitted of the charges, or that there is clear evidence of rehabilitation. [\(20\)](#) Applicant has failed to present sufficient evidence to show any of these factors apply. Most of his criminal conduct has been related to his abuse of alcohol, a concern that still exists as shown by his July 2006 arrest for DUI. His adverse conduct has occurred several times over much of his adult life. It is recent and ongoing, and Applicant's lack of insight into his problems with alcohol undermines any argument that he has been rehabilitated and is not likely to repeat such conduct in the future. Based on all of the available information about Applicant's criminal conduct, I conclude Guideline J against the Applicant.

**Whole Person.** In general, I conclude Applicant has not mitigated the government's security concerns about the results of his most recent background investigation. I have carefully weighed all of the available evidence, which presents a cross-section of Applicant's life since about 1989, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. Applicant is a mature adult, who has failed to grasp the seriousness of his relationship with alcohol and related criminal aspects of his drinking, particularly as it pertains to his suitability to hold a security clearance. While in the Navy, his drinking resulted in multiple instances of counseling, a diagnosis of alcohol dependence, and disciplinary measures through non-judicial punishment. Despite facing a previous decision by the Navy to revoke his clearance for many of the same reasons presented in this case, Applicant has continued his alcohol abuse and criminal conduct as a civilian. Available information case shows an absence of rehabilitation and a likelihood

of similar adverse conduct in the future. Absent substantial information to mitigate these concerns, which Applicant failed to provide, I conclude he has failed to overcome the government's case.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline G (Alcohol): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: Against the Applicant

(Amended) Subparagraph 1.j: Against the Applicant

Paragraph 2, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: For the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: For the Applicant

Subparagraph 2.e: For the Applicant

(Amended) Subparagraph 2.f: Against the 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. The record does not address the fact Applicant was driving without a license from his prior DWI conviction.
3. Gx. 12; Gx. 13.

4. Tr., 101- 102.
5. Gx. 3.
6. Gx. 2.
7. Tr., 42, 51; Gx. 2.
8. Tr., 53 - 55.
9. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
10. *See Egan*, 484 U.S. at 528, 531.
11. *See Egan*; Directive E2.2.2.
12. Directive, Enclosure 2.
13. At hearing, SOR ¶ 1.j was added to the SOR on oral motion of Department Counsel. I granted Department Counsel's Motion to Amend in accordance with Directive Section E3.1.17. The full text of the SOR ¶ 1.j is contained in the hearing transcript at page 107 - 108. Applicant did not object to the motion and admitted the facts contained in the new allegation (Tr., 108 - 100).
14. Directive, E2.A7.1.1.
15. Directive, 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; E2.A7.1.2.3. Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; and E2.A7.1.2.5. Habitual or binge consumption of alcohol to the point of impaired judgment.
16. Directive, E2.A7.1.3.
17. SOR ¶ 2.f originally cross-referenced SOR ¶¶ 1.b, 1.c, 1.e, 1.f, and 1.h. At hearing, Department Counsel moved to amend SOR 2.f to also cite the newly-added SOR ¶ 1.j, discussed in footnote 13, above. I granted Department Counsel's Motion to Amend in accordance with Directive Section E3.1.17. The full text of the amended SOR ¶ 2.f is contained in the hearing transcript at page 107 - 108. Applicant did not object to the motion and admitted the facts contained in the amended allegation (Tr., 108 - 110).
18. Directive, E2.A10.1.1.
19. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
20. Directive, E2.A10.1.3.