

DATE: October 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-04813

**DECISION OF ADMINISTRATIVE JUDGE**

**MARY E. HENRY**

**APPEARANCES**

**FOR GOVERNMENT**

John Baynard Glendon, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Between 1981 and 2003, Applicant, a 47-year-old foreman, was arrested and convicted of eight alcohol-related driving offenses. He attended alcohol counseling on three separate occasions between 1985 and 1988. He continues to consume alcohol at lower levels, and to drive. Applicant has not mitigated the government's security concerns regarding his alcohol consumption. He did not intentionally falsify his answers on his security clearance application. He has mitigated the government's concerns regarding his personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On October 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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. The SOR 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. Specifically, the SOR set forth security concerns arising under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On November 21, 2005, Applicant submitted a notarized response to the allegations. He initially elected to have his case decided on the written record in lieu of a hearing, but, on February 24, 2006, he submitted a request for a hearing.

This matter was assigned to me on August 25, 2006. A notice of hearing was issued on August 31, 2006, and a hearing was held on September 22, 2006. Eight government exhibits were marked and admitted into evidence as Government Exhibits 1 through 11. Applicant did not submit any additional evidence at the hearing, but did testify. The hearing transcript was received on September 22, 2006.

## FINDINGS OF FACT

Applicant admitted the allegations under Guideline G. These admissions are incorporated as findings of fact. He, however, denied the allegations under Guideline E.<sup>(1)</sup> After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact.

Applicant is a 47-year-old foreman for a defense contractor. He has worked for this contractor for a total of 24½ years. He completed a security clearance application (SF 86) in February 2004. The government previously granted him a secret clearance in 1990.<sup>(2)</sup>

Applicant married in 1990. He and his wife divorced in 2000. His three daughters, ages 18 and 15 (twins), live with their mother. He maintains regular contact with his daughters, and timely pays his child support obligations. The record contains no evidence of financial difficulties.<sup>(3)</sup>

Applicant initially worked for his current employer from 1980 until 1996. In 1996, his employer discharged him for sleeping on the job, a rules violation. His employer rehired him in 1998, and recently promoted him to foreman. His supervisors praise his work performance and workload management. They describe him as competent and responsible. He also attends training programs to improve himself. Since returning to work in 1998, he received one letter of reprimand in 2004, as a result of an employee being injured on the job.<sup>(4)</sup>

### **Alcohol Consumption**

Applicant describes his drinking as casual. In the past, he frequently drank beer at parties or bars, while with friends, and occasionally at home. He would drink till he was intoxicated, and then drive.<sup>(5)</sup> He currently drinks one or two glasses of wine with dinner, about three times a week. He acknowledges driving after consuming one or two beers or a glass of wine, but denies driving while impaired or drunk in recent years.<sup>(6)</sup>

In 1981, the police arrested and charged Appellant with driving under the influence (DUI). He pled *nolo contendere*, and the court fined him \$100 and ordered driving school. In 1982, the police arrested and charged him with driving while intoxicated (DWI). The court fined him and ordered DWI school.<sup>(7)</sup>

In 1983, 1984, and 1985 the police arrested and charged him with failure to submit to a chemical test when he refused to take a breathalyzer test. After each arrest, the court found him guilty of the charge, fined him, ordered DWI school, and suspended his driver's license. In 1984, the court also ordered him to attend an alcohol treatment program.<sup>(8)</sup>

Applicant attended outpatient alcohol treatment programs in 1985 and 1986. The counseling report from his 1985 treatment program indicates that he attended four counseling sessions, that he resisted abstinence, and that his prognosis was guarded. In 1986, he achieved all the goals of his treatment plan, but had not stopped drinking entirely. The counselor did not find any specific problems which needed to be resolved.<sup>(9)</sup>

Subsequent to attending these treatment programs, in 1987, Applicant again drove after drinking, which resulted in an automobile accident. The police arrested and charged him with DUI, leaving the accident scene after property damage, operating a motor vehicle without a license, and operating to endanger. He pled guilty to DUI, and the court found him guilty of leaving an accident scene and operating to endanger. The court sentenced him to two years probation, suspended his driver's licence, fined him \$225, and ordered him to attend an alcohol treatment program. He enrolled in an outpatient treatment program in 1988. He attended weekly group counseling sessions for 16 weeks, and occasionally attended Alcoholics Anonymous (AA) meetings on his own initiative. He completed the requirements of this program. The counselor indicated that he appeared to minimize his drinking, and referred to himself as a social drinker, despite his five DUI/DWI arrests, alcohol-related car accident, and past blackouts. At the end of the program, the counselor noted his self-reported abstinence from drinking, and opined that he would have a low recidivism rate if he continued to utilized community support.<sup>(10)</sup>

Between 1987 and 2000, Applicant did not become involved with the police as a result of his alcohol use. Applicant

reduced his drinking when he married and started a family.<sup>(11)</sup> However, in 1996, he fell asleep at work after drinking the prior evening. He admits that he came to work hung over. His employer discharged him for falling asleep at work, not alcohol use.<sup>(12)</sup>

Subsequent to his divorce, in 2000, Appellant drove a drunk friend home after they had been out drinking. He stopped for a red light and fell asleep. The police arrested and charged him with DWI and refusal to submit to a breathalyzer test, after observing him asleep in his car. The court fined him, suspended his driver's license, and ordered him to complete a DWI education program. On the way home from the beach in 2002, he and his girlfriend stopped to eat and drink at a restaurant. Before the end of the evening, they got into a fight, which ended when the police arrested and charged him with disorderly conduct.<sup>(13)</sup> The state dismissed the charges.

The police last arrested Applicant for an alcohol-related offense on December 17, 2003. He fell asleep driving on Interstate 95 and hit another vehicle. No one sustained any injuries. The police arrested and charged him with DUI, first offense, and refusal to submit to a chemical test.<sup>(14)</sup> He contested the charges in state district court.<sup>(15)</sup> The court fined him \$780, ordered 10 hours of community service, suspended his driver's license for 3 months, ordered him to attend DWI school, and dismissed the refusal to submit charge.<sup>(16)</sup>

### Personal Conduct

On February 26, 2004, Applicant completed his security clearance application. He answered "yes" to the following question, and listed only his 2003 DWI arrest:<sup>(17)</sup>

#### Question 24 Your Police Record- Alcohol/Drug Offenses

Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Applicant acknowledges that he did not list his 2000 arrest, but denies that he intentionally omitted this arrest or his earlier arrests. He did not list his earlier arrests because these arrests occurred more than seven years ago and had been listed on his prior security clearance application. He did not remember the 2000 arrest. When he met with the investigator, the investigator brought the arrest to his attention, which refreshed his memory. He acknowledged the arrest, and discussed what facts he could remember in his signed statement.<sup>(18)</sup>

Applicant answered to "no" to the following question on his security clearance application:

#### Question 26 Your Police Record - Other Offenses

In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Applicant denies intentionally falsifying this answer. When he completed his security clearance application, Applicant filled out, by hand, a written questionnaire given to him by his security officer. For Question 26, he answered "yes" and listed his disorderly conduct charge in 2002. The security officer then completed the electronic version based on his answers to the written questions. The security officer acknowledges that she erroneously answered "no" to Question 26.<sup>(19)</sup>

In completing the security clearance application, Applicant answered "yes" to Questions 19, 20, and 23. By so doing, he provided negative information regarding his employment history, a pending court action, and mental health. This<sup>(20)</sup>

information also had the potential to negatively impact his entitlement to a security clearance.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. 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. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive. Specifically, these are: (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. <sup>(21)</sup>

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. <sup>(22)</sup> The government has the burden of proving controverted facts. <sup>(23)</sup> The burden of proof is something less than a preponderance of the evidence. <sup>(24)</sup> Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. <sup>(25)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. <sup>(26)</sup>

No one has a right to a security clearance, <sup>(27)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>(28)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. <sup>(29)</sup> Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. <sup>(30)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Alcohol Consumption - 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.**

**Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.**

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

### **Alcohol Consumption**

The government has established its case under Guideline G. Based on all 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*), and AC DC E2.A7.1.2.5 (*Habitual or binge consumption of alcohol to the point of impaired judgment*) apply. Applicant's numerous DWI and DUI arrests, and subsequent convictions, qualify as alcohol-related incidents away from work. In addition to the above incidents, the evidence reflects a pattern of habitual drinking since 1981. Since attending college, Applicant has regularly drank beer at parties and on the weekends, as well as occasionally after work. Although he significantly reduced his consumption of beer between 1990 and 2000, he resumed his pattern of consuming alcohol after his divorce.

Although Applicant admitted to receiving alcohol treatment in 1985, 1986, and 1988, AC DC E2.A7.1.2.3 (*Diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence*) and AC DC E2.A7.1.2.6 (*Consumption of alcohol subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program*) do not apply because the medical documentation from these treatment facilities fails to provide a diagnosis of alcohol abuse or alcohol dependence.

I considered all the Alcohol Consumption Mitigating Conditions (AC MC) and conclude that none apply in this case. Applicant's alcohol-related incidents show a pattern of drinking to excess for many years. Twice his drinking resulted in automobile accidents and property damage. On both occasions he fell asleep while driving. His consumption is recent. His most recent DUI occurred less than three years ago. Despite alcohol counseling in the mid to late 1980s, he continues to drink regularly. He describes himself as a social drinker, but his arrests and automobile accidents suggests that his drinking is more than just social. He currently admits to drinking a glass of wine with a meal three times a week. He also acknowledged that he does drive after drinking at these levels. While he need not totally abstain from the use of alcohol, his pattern of drinking for many years and his long history of alcohol-related arrests raises security concerns. Although he limits the amount he drinks, he does not view his past behavior and regular consumption of alcohol as problematic. His efforts to reduce the quantity of alcohol he consumes are admirable. However, his reduction in his drinking volume is not enough to mitigate the security concerns arising from his drinking.

## **Personal Conduct**

Under Guideline E, the government established that Applicant omitted material facts from his SF-86 when he answered Questions 24 and 26. He denies, however, that he deliberately falsified his answers to these questions, arguing that he simply forgot about the 2000 arrest and that he correctly answered Question 26 on the questionnaire provided by his security officer. When a falsification allegation is denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. [\(31\)](#)

Applicant truthfully answered "yes" to Question 24 and listed an arrest in 2003 for DUI. His testimony that he forgot about the 2000 arrest is credible, given that he not only listed the 2003 arrest, but that he also truthfully answered other questions which provided negative information about his past employment history and medical treatment. He had no apparent reason to hide this information in light of the other negative information he provided. As to Question 26, his evidence clearly reflects that he provided the information about his 2002 arrest to his security officer, and that she incorrectly typed "no" as his answer to this question. I find that Applicant did not deliberately falsify his answers to Question 24 and 26. Thus, the government has not established that Applicant intentionally falsified his answers on his security clearance application. Guideline E is found in favor of Applicant.

## **Whole Person Analysis**

Protection of our national security is of paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the adjudicative process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Thus, in reaching this decision, I have considered the whole person concept in evaluating Appellant's risk and vulnerability in protecting our national interests.

Applicant's drinking and resulting problems occurred over a period of almost 25 years. While the evidence of record

reflects that between 1987 and 2000, only one potential alcohol-related offense occurred, his dismissal for sleeping on the job after a night of drinking, he resumed his drinking patterns when his marriage ended in 2000. To his credit, he works steadily and regularly. He has worked for his employer for more than 24 years. He performs his job well and his employer can rely on him. His drinking has not caused financial problems. He pays his bills and has always provided child support for his children. He drinks less now, but has not recognized that his drinking patterns indicate his drinking may not be limited to social drinking. He still continues to drive after drinking, despite his involvement in two property damage only automobile accidents. His decision to continue to drink and drive raises a concern about his exercise of judgment. He has not mitigated the government's security concerns. Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

### **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:

#### Paragraph 1, Guideline G : 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: For Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.I: Against Applicant

Subparagraph 1.j: For Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Subparagraph 1.n: Against Applicant

#### Paragraph 2, Guideline E : FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Applicant's response to the SOR, dated November 18, 2005, at 1.
2. Government Exhibit 1 (Applicant's security clearance application, dated February 26, 2004) at 1-2, 7-8; Tr. at 23-24.
3. *Id.* at 3-4; Tr. at 3-4, 21.
4. Applicant's response, *supra* note 1, at 4-5; Government Exhibit 1, *supra* note 2, at 5-6; Tr. at 24-26.
5. Government Exhibit 2 (Applicant's statement, dated September 20, 1990) at 2; Tr. at 21, 47-48.
6. Tr. at 21-22, 47-48.
7. Government Exhibit 2, *supra* note 6, at 2; Government Exhibit 5 (1981 arrest report), Government Exhibit 8 (Driving record abstract, 1985).
8. Government Exhibit 2, *supra* note 6, at 2; Government Exhibit 6 (Police arrest report, dated June 1985); Government Exhibit 8, *supra* note 7, at 1.
9. Government Exhibit 11 (Letter dated September 25, 1990, regarding 1985 treatment and 1986 treatment notes) at 1-8; Tr. at 33-34.
10. Government Exhibit 7 (Court docket sheet dated September 1987); Government Exhibit 9 (1988 Treatment record) at 1-5; Government Exhibit 10 (Status report to court from 1988 treatment) at 1-3; Tr. at 31-34.
11. Government Exhibit 3 (Applicant's personal statement, dated November 8, 2004) at 1; Tr. at 21, 30.
12. Government Exhibit 3 (Applicant's personal statement, dated November 8, 2004) at 2.
13. Tr. at 22-23, 27-28, 31-35.
14. Government Exhibit 1, *supra* note 2, at 7.
15. He requested that his case be heard in district court, not traffic court. This request caused confusion with which court had jurisdiction; thus, his arrest for failure to complete DWI driving school was dropped, when it was determined that he had appeared in district court on the charges.
16. Government Exhibit 1, *supra* note 2, at 1, 6-7.
17. *Id.*
18. Applicant's response, *supra* note 1, at 1; Government Exhibit 3, *supra* note 5, at 1; Tr. at 37-39.
19. Applicant's response, *supra* note 1, at 2-3; Tr. at 37.
20. Government Exhibit 1, *supra* note 2, at 5-6.
21. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.
22. ISCR Case No. 96-0277 at 2 (App. Bd., July 11, 1997).
23. ISCR Case No. 97-0016 at 3 (App. Bd., December 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

24. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

25. ISCR Case No. 94-1075 at 3-4 (App. Bd., August 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

26. ISCR Case No. 93-1390 at 7-8 (App. Bd. Decision and Reversal Order, January 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

27. *Egan*, 484 U.S. at 531.

28. *Id.*

29. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

30. Executive Order No. 10865 § 7.

31. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).