

DATE: December 29, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-08486

## DECISION OF ADMINISTRATIVE JUDGE

**KATHRYN MOEN BRAEMAN**

### APPEARANCES

#### FOR GOVERNMENT

Braden M. Murphy, Esquire, Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant's mitigated security concerns over his criminal conduct, personal conduct and alcohol issues. At each stage of the investigation from 1996 to 2005, Applicant established he had no intent to falsify: in three different security forms he repeatedly complied with his duty to disclose adverse information on his arrest record and also provided substantial adverse details in his 1998 statement. While he has multiple misdemeanor arrests from 1988 to 2004, he has no recent incidents in the past three years and has fully complied with all court-ordered alcohol education and probation requirements after his alcohol-related arrests. Clearance is granted.

### STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on May 5, 2006. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.<sup>(1)</sup> The SOR alleges specific concerns over criminal conduct (Guideline J), personal conduct (Guideline E), and alcohol (Guideline G).

Applicant responded to these SOR allegations in an Answer dated<sup>(2)</sup> June 20, 2006, and requested a decision be made without a hearing. Subsequently the Department Counsel prepared a File of Relevant Material (FORM) on October 23, 2006, where he included a Motion to Amend the SOR to correct technical errors in the SOR as originally issued. He proposed the following corrections:

2.a. should incorporate a reference to subparagraph 1.d., above, NOT 1.e.

2.c. should reference the date of May 6, 2005, the date of his OPM affidavit.

3.a. should include the allegation as a separate subparagraph, instead of being included in the overall concern, and should state: "You operated a vehicle under the influence of alcohol as stated in paragraphs 1.a., 1.c., and 1.e. above."

The FORM was forwarded to Applicant on October 25, 2006, with instructions to respond and supply information

within 30 days of receipt. He received the FORM on November 4, 2006. Applicant did not object to any of the SOR corrections, so the Motion to Amend is granted. In response Applicant submitted his Answer with the addition of his notarized signature, dated November 11, 2006, but submitted no new information. The case was assigned to me on November 20, 2006.

### **FINDINGS OF FACT**

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following findings of fact:

Applicant, 41 years old, has been employed by a defense contractor in State #1 as an engineer since November 2001. He completed a Security Clearance Application (SF-86) which he signed on July 22, 2004, which was submitted on September 13, 2004. He was previously on active duty in the military from March 1996 to July 2001; he had been granted a Secret clearance in February 2000. (Item 4) Applicant studied at a technical school from June to August 1999 and received a certificate. Applicant has never married. (Item 4)

### **Criminal Conduct, Personal Conduct, Alcohol**

Applicant first used alcohol when he was twenty years old. In 1998 he provided a statement to the Defense Security Service (DSS) where he reported that at that time he was drinking one or two beers every two or three weeks. (Item 10) In May 2005 he assessed himself as a social drinker who does not have any dependency on alcohol in an Office of Personnel Management (OPM) Affidavit. At the time of his 2004 arrest he was having family problems as his father had just died. While he minimized his past problems with drinking and stated he had only had a DUI in August 1988 to OPM, he had previously provided complete details of his 1997 DUI in his DSS Statement. (Item 5) Applicant had misdemeanor five arrests between 1988 and 2004:

- SOR 1.a. Applicant was arrested in January 2004, charged with Driving Under the Influence (DUI), found guilty and sentenced to pay court costs and a fine; he was placed on probation. He disclosed this arrest on his SF-86. (Items 3, 4) At the time of his 2004 arrest he was having family problems as his father had just died. (Item 5) He submitted to a breathalyzer, registered .11 BAC, and was taken to jail; he stated that night he had four to five beers, four to five mixed drinks, and two shots with little food. He had been given a permit to drive to work. He took an alcohol education program for 21 hours and attended Alcoholics Anonymous (AA) meetings. He views himself as a social drinker. He was assessed as not needing any more counseling. (Item 5) Applicant received a certificate for completing the education course of the Counterattack Program in February 2005. (Items 5, 6) Applicant completed his probation and satisfied his suspended license restriction in April 2005. He has had no additional incidents. (Item 6)
- SOR 1.b., 2.b. Applicant was stopped in April 2003 and cited for possession of drug paraphernalia. In court the charges were dismissed. He did not know he was in a neighborhood known for drug dealing. He forgot to disclose this information on his 2004 SF 86 because the charge was dismissed and he did not remember it. He stated in an Affidavit to OPM in May 2005 that he does not use drugs and does not have drug paraphernalia<sup>(3)</sup>. (Items 3, 5, 7)
- SOR 1.c., 2.c. In his 1998 SF-86 Applicant disclosed he received non-judicial punishment at a captain's mast for DUI in July 1997. Punishment included 60 days extra duty, suspended forfeiture of pay for two months and a six month suspended reduction in rank. He forgot to re-list this incident on his 2004 SF-86. He had provided documentation of this incident on his 1998 SF-86 and to DSS in 1998. He was referred to CAC for alcohol screening and advised that he did not have a problem with the use of alcohol and was not dependent on alcohol; however, he was required to participate in a Level I CAC education program in July or August 1997. After he successfully completed the program and a voluntary one year aftercare program, he was released from the military Drug and Alcohol Abuse Program in July 1998. (Items 3, 9, 10, 11, 12, 13)
- SOR 1.d., 2.a. Before he joined the military Applicant advised on his SF 88 of his 1995 arrest for criminal trespass, theft by unlawful taking, receiving stolen property, unauthorized use of an auto, and violation of the controlled substances act; these charges were reduced to two counts of disorderly conduct; he was ordered to pay restitution and fines and court costs totaling \$673. The Navy granted him a waiver. He provided details to DSS in a 1998 Statement

including his admission that during this arrest he provided a false name to a police officer as his driver's license was suspended. In 2004 he forgot to re-disclose this information again as it slipped his mind. He had disclosed it earlier in his initial security investigation for the military. He had no intent to falsify. (Items 3, 5, 8, 10, 14)

- SOR 1.e. Applicant advised the military on his SF 88 of his arrest in August 1988 and charge of DUI,; he had been placed on probation for one year, had a suspended license and entered an accelerated rehabilitation disposition program where he attended alcohol classes. He successfully completed the program. Applicant paid \$248 in court costs. He disclosed this arrest on his 2004 SF-86 and on his 1998 SF-86 as well as to DSS in 1998. (Items 3, 4, 8, 9, 10, 14)

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below:

### **Guideline J - Criminal Conduct**

***The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

### **Guideline E - Personal Conduct**

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

### **Guideline G - Alcohol Consumption**

***The Concern:* 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 responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## CONCLUSIONS

### **Criminal Conduct**

The government provided evidence to support security concerns<sup>(4)</sup> over criminal conduct as Applicant had five misdemeanor arrests from 1988 to 2004. Only the April 2003 charge was dismissed. The 1995 and 1998 incidents were fully disclosed before he joined the military and his 1998 incident was disclosed on his 1998 SF-86. Arguably, all these incidents were mitigated when he was granted a security clearance in the military in 2000. However, his additional arrest in 2003 and conviction in 2004 suggest a pattern which might be disqualifying.

To his credit, Applicant took corrective action<sup>(5)</sup> and completely complied with all of the requirements after each

alcohol-related arrest as detailed in my Findings. Thus, as to the earlier arrests in 1988, 1995, and 1997, I conclude that under mitigation condition (MC) 1, that the criminal behavior was not recent. Also, I note he has no subsequent incidents in the past three years since the January 2004 incident. With respect to the 2003 arrest for Possession of Drug Paraphernalia, I consider it mitigated as it was dismissed.

Notably, following the January 2004 arrest, he was found guilty and placed on probation. However, he completed the required education course, attended AA, and completed his probation in April 2005. Consequently, under mitigation condition 6, there is clear evidence of successful rehabilitation. There have been no succeeding incidents in the succeeding three years.

Thus, after looking at the whole person and considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under SOR Paragraph 1 as he mitigated the allegations in SOR subparagraphs 1.a., 1.b., 1.d., and 1.e.

### **Personal Conduct**

Applicant mitigated concerns over his failure to disclose all of his criminal conduct on his 2004 SF-86 and concerns over his failure to be totally candid in the OPM interview as Applicant established he had no intent to falsify. He did disclose substantial adverse information fully at each stage of the previous investigative efforts - in his initial SF 88 in 1996, in his subsequent SF-86 in 1998, and in his August 1998 interview with DSS. Thus, I conclude he consistently provided details of all of the information on his bleak past. Thus, as had earlier disclosed all adverse information in previous documents and in an earlier investigative interview, I conclude he had no intent to falsify either in his 2004 SF-86 or in his 2005 Affidavit with OMP. [\(6\)](#)

While the Government argues Applicant should have re-disclosed all significant adverse information in 2004 in his SF-86, I conclude that he credibly explained he had no intent to falsify and note that in all previous security forms he fully disclosed adverse information. Thus, I find him credible when he argues that he only omitted his April 2003 arrest because he was not convicted. I note, for example, he had previously revealed a similar arrest in his initial SF-88 (not alleged in the SOR.). With respect to the OPM 2005 Affidavit, I conclude he meets mitigation condition 5 as he had taken positive steps previously to disclose all this adverse information in an earlier DSS interview. For example, in his initial 1998 DSS interview where he disclosed details on how and why he had concealed his identity in 1995 and also details on his 1997 captain's mast. Thus, Applicant meets MC 5 based on his consistent previous disclosures of adverse information which significantly reduce or eliminate his vulnerability to coercion, exploitation, or duress.

After looking at the whole person and considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 2.a., 2.b., and 2.c. under SOR Paragraph 2.

### **Alcohol Consumption**

The Government established security concerns over Applicant's problem drinking and his alcohol-related arrests in 1988, 1997, and 2004. Thus, Applicant's conduct falls within DC 1 [\(7\)](#): Alcohol-related incidents away from work.

To his credit after each arrest, Applicant complied with all court-ordered education and also voluntarily completed a one-year after care program in 1998 while he was in the military. Although he has been assessed, Applicant was never diagnosed with an alcohol abuse or dependence problem. He stated he is a social drinker who is not dependent on alcohol.

Significantly, Applicant fully complied with the court's requirements and successfully completed the required education programs in February 2005 and completed probation in April 2005. Thus, Applicant has mitigated the alcohol-related security concerns as he provided evidence to demonstrate that he falls within mitigating condition (MC) 3. [\(8\)](#) Under MC 3 (positive changes in behavior supportive of sobriety), I note that Applicant's alcohol-related arrests have recurred but at long intervals. There is no evidence of any new problems in almost three years since his January 2004 arrest. While not by itself mitigating, I note that there were special circumstances surround the arrest in 2004 as at that time he was upset over the death of his father.

In sum, Applicant has demonstrated under MC3: positive changes in behavior supportive of sobriety. After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 3.a. under SOR Paragraph 3.

### FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Paragraph 3. Guideline G: FOR APPLICANT

Subparagraph 3.a.: For Applicant

### DECISION

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

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. In the FORM Department Counsel noted Applicant's failure to have his Answer notarized and in an undated letter offered Applicant the opportunity to provide a notarized signature on his Answer when he responded to the FORM; in response Applicant provided a notarized signature, dated November 11, 2006, on his Answer. (Item 3)
3. Applicant advised the military on his 1996 SF 88 of his 1995 arrest for possession of drug paraphernalia where he paid a \$298 fine; this incident was not alleged in the SOR, but indicates he previously fully disclosed his past arrest record. (Item 14)
4. **E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:** E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2 .2. A single serious crime or multiple lesser offenses.

**5. E2.A10.1.3. Conditions that could mitigate security concerns include:** E2.A10.1.3. 1. The criminal behavior was not recent; E2.A10.1.3. 2. The crime was an isolated incident; E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

E2.A10.1.3. 4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3. 5. Acquittal; E2.A10.1.3. 6. There is clear evidence of successful rehabilitation.

**6. E2.A5.1.3. Conditions that could mitigate security concerns include:** E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; E2.A5.1.3.6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

**7. E2.A7.1.1.2. Conditions that could raise a security concern and may be disqualifying include:** E2.A7.1.1.2.1. 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.

**8. E2.A7.1.1.3. Conditions that could mitigate security concerns include:** E2.A7.1.1.3.1. The alcohol related incidents do not indicate a pattern; E2.A7.1.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem; E2.A7.1.1.3.3. Positive changes in behavior supportive of sobriety; E2.A7.1.1.3.4. Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with after-care requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.