

DATE: November 3, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-09433

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a decades-long history of criminal conduct consisting of arrests and convictions for alcohol-related offenses and other offenses. He gave two false answers about his police record when he completed a security-clearance application in June 2005. He failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns stemming from these matters. Clearance is denied.

### **STATEMENT OF THE CASE**

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on April 6, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR-- which is in essence the administrative complaint--alleges security concerns under Guideline G for alcohol consumption, Guideline J for criminal conduct, and Guideline E for personal conduct (falsification). In a response dated May 8, 2006, Applicant replied to the SOR and indicated he did not wish to have a hearing. On June 22, 2006, department counsel submitted his written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM) was mailed to Applicant and it was received by him on July 31, 2006. Applicant submitted additional documentary information within the 30-day period after receiving the FORM. The case was assigned to me September 18, 2006.

### **FINDINGS OF FACT**

In his response to the SOR, Applicant admits many of the factual allegations in the SOR and his admissions will be discussed below. In addition, I make the following findings of fact.

1. Applicant is a 50-year-old man who is employed as a site rodbuster. He has worked for his current employer since June 2005. He is seeking to obtain a security clearance for his employment with a federal contractor. Before his current

job, Applicant has been employed for many years doing concrete and carpenter work.

2. His security-clearance application indicates he has never married. But other information in the FORM indicates he has been married for many years and has a child.

3. Applicant has a history of criminal conduct from about 1976 to about 2005. His offenses primarily involve alcohol-related incidents, such as driving while intoxicated (DWI). In his eight-page response to the SOR, Applicant addressed his alcohol consumption and criminal record, and he admitted the following alcohol-related incidents:

- Arrested and charged with DWI in 1976.
- Arrested, charged, and convicted of DWI in 1978.
- Arrested and charged with DWI in 1980.
- Arrested and charged with DWI and leaving the scene of an accident in 1981.
- Arrested and charged with DWI on two occasions in March 1982.
- Arrested, charged, and convicted of DWI in August 1982.
- Arrested, charged, and convicted of DWI, speeding, driving with a license, traffic lane violation, and false report in October 1982.
- Arrested and charged with DWI, driving with a suspended or revoked license, and two traffic offenses in March 1985. Convicted of DWI and the other matters were dismissed.
- Arrested and charged with open container, DWI, and failure to maintain lane in 1994. The charges were *nolle prossed*.
- Arrested, charged, and convicted of DWI in March 1997.
- Arrested and charged with DWI and child abuse in June 1997.
- Received counseling for alcohol use in 1998.
- Arrested and charged with aggravated DWI and a traffic offense in 1999. Both charges were dismissed.
- Arrested and charged with aggravated DWI and a traffic offense in 2001. Convicted of DWI.
- Arrested and charged with battery-domestic violence in 2005. Denies being convicted, but the record evidence (Exhibit 12) proves otherwise.

4. In addition to his alcohol-related incidents, Applicant admitted the following:

- Arrested and charged with possession of hashish in 1977.
- Arrested and charged with interference in 1978.
- Arrested and charged with obstructing traffic in 1981.
- Arrested and charged with disorderly conduct in 1982.
- Arrested, charged, and convicted of driving on a suspended license, unlawful alter/forging a driver's license, and a traffic offense in 1986.
- Arrested, charged, and convicted of battery-domestic violence in 1989.

Also, Applicant was arrested, charged, and convicted for failure to appear in connection with the 2005 battery-domestic violence case. He has served jail time (never more than one year) on several occasions.

5. In June 2005, Applicant completed a security-clearance application for his employer. In completing the application, he was required to truthfully answer questions about his background. The SOR alleges that Applicant gave deliberately false answers to two questions. Each is discussed below.

6. In response to Question 23, <sup>(2)</sup> he answered "no" and did not report the 2005 battery-domestic violence offense that was then pending. In response to Question 24, <sup>(3)</sup> he answered "yes" and reported a single DWI offense from 2002. He did not report any of the other DWI charges and convictions detailed above.

7. In his response to the FORM, Applicant submitted a letter of recommendation, a court record concerning his alcohol treatment, and a newspaper article. In the letter of recommendation, his project engineer for about four months gives Applicant a strong recommendation based on his hard work and taking the initiative to get the job done. The court record reflects Applicant received alcohol treatment in December 2005 for 28 days. The comments and

recommendations include the following: (1) Applicant did well concerning assignments and got along well with peers and staff; (2) he was advised to avoid substance use in the future; (3) he was referred to 12-step programs for follow-up and support of an abstinent lifestyle; (4) he was encouraged to complete his education and develop hobbies to occupy his free time; and (5) it was noted he is quite sociable and amicable when he wants to be and when he is sober. There is no mention of either a diagnosis or prognosis. The newspaper article was a feature article about Applicant's abilities as an artist and it reported that he won the best of show award at a local county fair. The article notes that Applicant's art career includes stone carving, painting, and jewelry making. Also, the article notes that Applicant has had a long rodeo career as a bronco rider.

8. In his written response to the FORM, Applicant asserts that he was grown as a person, respects his country, and would never do anything to harm it. Also, he admits making mistakes in his past and points out that he has paid for his mistakes.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.<sup>(4)</sup> A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>(5)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## BURDEN OF PROOF

The only 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>(6)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(7)</sup> The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(8)</sup> An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(9)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

No one has a right to a security clearance.<sup>(11)</sup> And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

### **1. The Alcohol Consumption Security Concern**

Under Guideline G,<sup>(13)</sup> a history of excessive alcohol consumption raises a security concern because of the potential for deliberate or inadvertent mishandling of classified information due to intoxication. The concern is that excessive 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.

Here, based on the record evidence as a whole, the government established its case under Guideline G. The record evidence is clear--Applicant has a history of excessive alcohol consumption resulting in numerous arrests and convictions for alcohol-related incidents, mostly DWI offenses. His multiple arrests and convictions for DWI are of special concern because his repetitive conduct indicates a tendency toward reckless behavior or an unwillingness to comply with the law.

Given the facts here, DC 1 <sup>(14)</sup>--alcohol-related incidents away from work--applies against Applicant. The record evidence is filled with incidents or allegations of criminal conduct directly related to Applicant's alcohol use.

I reviewed the MC under the guideline and conclude none apply. Applicant has not presented a persuasive case that his alcohol-related incidents are a thing of the past. What's needed here is a long-term period of abstinence along with a long-term period of no further alcohol-related incidents. At this point, it is too soon to tell if Applicant will follow through and be able to maintain a sober lifestyle.

## **2. The Criminal Conduct Security Concern**

Under Guideline J, <sup>(15)</sup> criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. 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 sensitive information.

Here, based on the record evidence as a whole, a security concern is raised under Guideline J. The record evidence shows Applicant has a history or pattern of criminal conduct over many years. He has numerous arrests, several convictions, and has served jail time. Given these facts and circumstances, both DC 1 <sup>(16)</sup> and DC 2 <sup>(17)</sup> apply against Applicant. His history of criminal conduct creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the MC under the guideline and conclude none apply. Applicant has not presented a persuasive case that his history of criminal conduct is a thing of the past unlikely to recur. At this point, it is too soon to tell if Applicant will follow through and be a law-abiding citizen.

## **3. The Personal Conduct Security Concern**

Personal conduct under Guideline E <sup>(18)</sup> is always a security concern because it asks the central question: Does a person's past conduct justify confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Here, based on the record evidence as a whole, a security concern is raised under Guideline E. The record evidence shows Applicant deliberately provided false answers to Questions 23 and 24 concerning his pending offense and his alcohol-related offenses. <sup>(19)</sup> Applicant was required to give full, frank, and truthful answers to these questions and it's plainly obvious that he did not. His false answers in response to two questions on his security-clearance application show questionable judgment, lack of candor, unreliability, and untrustworthiness.

I reviewed the MC under the guideline and conclude none apply. Making false statements during the security-clearance process is a serious matter, not easily explained away, extenuated, or mitigated.

## **4. The Whole-Person Concept**

I considered the available information in light of the whole-person concept. Applicant is now a 50-year-old man and was a mature adult when most of his alcohol-related troubles took place. <sup>(20)</sup> In other words, he was old enough to know better. He has an extensive history of criminal conduct (mostly alcohol-related offenses), and his last conviction was in 2005. <sup>(21)</sup> His overall situation appears to be a firmly ingrained pattern of behavior that is likely to recur. Also, he did not present a persuasive case that his alcohol-related troubles are behind him and what steps and actions he is doing to accomplish this task. <sup>(22)</sup> More troubling, however, are his false answers on his June 2005 security-clearance application,

which are serious matters as well as constituting criminal conduct under federal law.<sup>(23)</sup> Considering the record evidence as a whole, I conclude Applicant failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns arising under Guidelines G, J, and E. And he has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline G: Against Applicant

Subparagraphs a-r: Against Applicant

SOR ¶ 2-Guideline J: Against Applicant

Subparagraphs a-i: Against Applicant

SOR ¶ 3--Guideline E: Against Applicant

Subparagraphs a-b: Against 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.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. "Are there currently any charges pending against you for any criminal offenses?"
3. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"
4. Directive, Item E2.2.1.
5. Executive Order 10865, § 7.
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
8. Directive, Enclosure 3, Item E3.1.14.
9. Directive, Enclosure 3, Item E3.1.15.
10. Directive, Enclosure 3, Item E3.1.15.
11. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).

12. 484 U.S. at 531.

13. Directive, Enclosure 2, Attachment 7 (setting forth the disqualifying and mitigating conditions).

14. Item E2.A7.1.2.1.

15. Directive, Enclosure 2, Attachment 10 (setting forth the disqualifying and mitigating conditions).

16. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

17. Directive, Item E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

18. Directive, Enclosure 2, Attachment 5 (setting forth the disqualifying and mitigating conditions).

19. Directive, Item E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

20. Directive, Item E2.2.1.4. The individual's age and maturity at the time of the conduct.

21. Directive, Item E2.2.1.9. The likelihood of continuation or recurrence.

22. Directive, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes.

23. Directive, Item E2.2.1.1. The nature, extent, and seriousness of the conduct.