

DATE: December 28, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-15659

## **DECISION OF ADMINISTRATIVE JUDGE**

**JACQUELINE T. WILLIAMS**

### **APPEARANCES**

#### **FOR GOVERNMENT**

J. Theodore Hammer, Esq., Department Counsel

#### **FOR APPLICANT**

David P. Price, Esq.

### **SYNOPSIS**

Applicant is a 45-year-old mechanic who has been employed by a contractor since July 1980. He has a lengthy history of criminal activity, most of which is related to problems with alcohol. Between 1981 and 2001, he had at least five convictions for driving under the influence, which included court-ordered attendance at the alcohol safety action program each time. After the 2001 incident, Applicant decided to stop drinking and has been sober. He did not deliberately falsify a material fact in a question on his security clearance application. Applicant has mitigated the criminal conduct, alcohol consumption, and personal conduct security concerns. Clearance is granted.

### **STATEMENT OF THE CASE**

On December 12, 2003, Applicant executed a Security Clearance Application (SF 86).<sup>(1)</sup> On April 19, 2006, 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 Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted or revoked.

In a sworn, written statement, dated May 2, 2006, Applicant responded to the SOR allegations and requested an in-person hearing. The case was assigned to me on September 19, 2006. His attorney filed a Notice of Appearance on September 22, 2006. A Notice of Hearing was issued on October 6, 2006, scheduling the hearing for October 26, 2006. The hearing was conducted as scheduled. At the hearing, the Government offered five exhibits, Gov. Exs. 1-5, and Applicant offered five exhibits, Exs. A through E, all were accepted into the record. The transcript (Tr.) was received on December 8, 2006.

## FINDINGS OF FACT

Applicant admitted the allegations under Guideline J, subparagraphs 1.b through 1.i. He denied the allegations in subparagraph 1.a, as well as subparagraphs 2.a and 3.a. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a 45-year-old mechanic and has been employed by a defense contractor since July 1980. He was married. After he divorced his wife, his stepson, who is not his biological child, moved back in with Applicant, who was instrumental in helping him get into college. <sup>(2)</sup>

On or about June 12, 1981, Applicant was charged with driving under the influence (DUI). Applicant denies this allegation. On October 27, 2003, he received a transcript of his driver's history, which indicates "11 year record." Consequently, he used that document as the information to complete his SF 86. The document contained information on DUI convictions in 1993, 1995, and 2001. The document did not have any convictions listed before 1993. Applicant knew that he had at least one DUI in the 1980s, so on the SF 86 he guessed a month and year since he did not want to leave it blank.

In August 1984, he was arrested and charged with DUI. He was found guilty and ordered to attend the state Alcohol Safety Action Program (ASAP). He was fined an unspecified amount.

In July 1985, Applicant was arrested and charged with DUI. He was found guilty and ordered to attend ASAP. He was fined an unspecified amount and sentenced to an unspecified time in jail, all suspended.

On February 4, 1993, he was arrested and charged with one count domestic assault, destroying private property, and assault. He, his wife, and her boyfriend had a minor altercation. The two men filed charges against each other. Applicant was found guilty of the assault charge and the other charges were dismissed.

On May 20, 1993, he was arrested and charged with possession of marijuana. The charge was dismissed.

On July 29, 1993, Applicant was arrested and charged with DUI. He was found guilty and ordered to attend ASAP and fined an unspecified amount.

On June 28, 1995, he was arrested and charged with DUI. On October 26, 1995, he was found guilty. He was fined \$1,000 (\$750 suspended), sentenced to 12 months in jail (all but four days suspended), placed on non-reporting probation for three years, and ordered to attend ASAP.

On August 30, 1997, Applicant was arrested and charged with obstruction of justice. The charge was *nolle prosequi*.

On May 5, 2001, Applicant was arrested, refused to submit to a breath/alcohol test, and charged with DUI. He was found guilty and sentenced to 12 months in jail (suspended), fined \$200, ordered to pay court costs of \$70, suspended operator's license for an unspecified time, and ordered to attend ASAP. The refusal to submit to a breath/alcohol test was *nolle prosequi*.

After the 2001 DUI, Applicant was ordered to have an ignition interlock installed on his car, which prevents him from driving if he has been drinking. <sup>(3)</sup> There was an apparatus to breathe into in order to detect whether he was positive for alcohol. If he was not positive for alcohol, the car would start. Randomly, while driving, he would have to breathe into the mechanism. If it registered positive for alcohol while driving, the light and horns would go off and the car would not start again until the installer was contacted. <sup>(4)</sup> This apparatus was on his car for at least two years. <sup>(5)</sup>

Applicant presented the testimony of four character witnesses, as well as his own testimony. The first witness is a construction supervisor at Applicant's place of employment, who has a security clearance. <sup>(6)</sup> He first met Applicant on the job in either 1997 or 1998. Applicant soon became the make-up foreman, taking the lead if his supervisor was unavailable at the work site. The witness was his direct supervisor then. In the past year, Applicant was promoted to

foreman, and he worked directly for this witness until a month before the hearing. He stated that Applicant is all business, he knows his procedures, and is very conscientious about getting his job done. He hardly ever socializes with Applicant outside of work and became aware of the allegations in the SOR about a month before the hearing. He indicated Applicant's drinking did not impact his job.

The second character witness, who has a security clearance, testified that he met Applicant at work in 1995.<sup>(7)</sup> The witness had heard that Applicant was an excellent mechanic and decided to hire him. They have worked together for more than 11 years. Applicant came to work, did his job, did not have an attendance problem, and was a "top notch"<sup>(8)</sup> mechanic. He did not know that Applicant had a drinking problem until Applicant was completing his SF 86 and confided in him.<sup>(9)</sup> This witness would be critical in recommending Applicant for a promotion, and he added that Applicant is doing an excellent job.<sup>(10)</sup>

The third witness, who has a security clearance, has known Applicant from work since 1980 or 1981. This witness has had both a professional and social relationship with Applicant. They used to ride their motorcycles together, go bowling, and go to cookouts.<sup>(11)</sup> During this time, Applicant did consume alcohol. Currently, Applicant is the witness' supervisor.<sup>(12)</sup> At one point they did not work alongside each other. Then, this witness returned to work alongside Applicant in 1998 or 1998 and said that "[Applicant] was pretty much clean. He didn't drink no more."<sup>(13)</sup>

Applicant's oldest sister testified.<sup>(14)</sup> Applicant gets together with his family at her house or their sister's on holidays, cookouts, birthdays, and just visiting their mom who lives with his oldest sister and her family. She acknowledged Applicant drank mainly on weekends, and she knew that because she had to bail him out.<sup>(15)</sup> When he received the DUI in 2001, she told him not to call her anymore because "[Applicant] is getting too old for this."<sup>(16)</sup> After he divorced his wife, his stepson eventually moved back in with Applicant.<sup>(17)</sup> In 1997, she named Applicant as her child's guardian, because she believed her brother would do a fine job based on how he raised his stepson.<sup>(18)</sup>

Applicant is remorseful for his past criminal and alcoholic transgressions, which occurred while he held a security clearance.<sup>(19)</sup> He testified that it hit him in May 2001, after his last DUI, that he could lose everything, including his job, house, his family if he continued to get into trouble. He decided then and there to quit drinking.<sup>(20)</sup> He is still attending Alcoholic Anonymous (AA) meetings. He usually attends two to three times a month.<sup>(21)</sup> His last drink was during the Christmas holidays in 2004 when the party was held at his house. He drank a couple of beers.<sup>(22)</sup> To avoid backsliding and drinking again, he no longer frequents those places where he used to drink, he has new friends, and he has decided to act more responsibly.<sup>(23)</sup>

When he executed his SF 86 on December 12, 2003, Applicant responded "no" to question 24 (Your Police Record - Alcohol/Drug Offenses. Have you ever been charged with or convicted of any offenses(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 failed to report the alcohol and drug charges filed against him in 1984 and 1985.

Applicant submitted approximately 16 character statements, all stating that they now know of his drinking problem, but never saw evidence of it in the workplace. Applicant had always displayed professionalism.<sup>(24)</sup>

In a letter dated October 17, 2006, his former substance abuse counselor indicated that Applicant participated in a program from August 31, 2001 to February 6, 2002.<sup>(25)</sup> She stated that Applicant successfully completed the program and he met all program requirements. He was seen again on September 28, 2006 for an alcohol evaluation and reassessment. He reported on that date that he has been abstinent since December 2004 and his last drink prior to that was May 5, 2001. His urine drug screen on September 28, 2006 was negative. He continued to regularly attend 12-step meetings. She stated that "[Applicant's] prognosis is very favorable should he continue to follow this recovery maintenance [sic] plan."

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

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>(26)</sup> The Government has the burden of proving controverted facts.<sup>(27)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(28)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(29)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(30)</sup>

No one has a right to a security clearance<sup>(31)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(32)</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>(33)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(34)</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 consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

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

**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.

**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.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards, and I reach the following conclusions.

### **Criminal Conduct**

The Government has established a *prima facie* case for disqualification under Guideline J, Criminal Conduct. Applicant has been arrested and charged with DUI at least five times between 1981 and 2001. Consequently, Criminal Conduct

Disqualifying Conditions (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.

Various factors can mitigate the criminal conduct security concern. Applicant's criminal behavior spanned almost 20 years, and included five DUIs. After each DUI, he was ordered to attend an alcohol safety program, which obviously did little to help him since he continued to collect DUI charges. However, after his 2001 DUI, he decided to stop drinking, and except for a couple of beers at a holiday party in 2004, he has been alcohol-free. He credibly testified that he was about to lose everything of value, including his career, family, and friends. The record is devoid of Applicant being involved in any recent criminal activity. Thus, Criminal Conduct Mitigating Conditions (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 mitigated the Government's case. Accordingly, allegations 1.a through 1.i are concluded for Applicant.

## **Alcohol Consumption**

Under Guideline G, a security concern exists for an individual who excessively consumes alcohol because it 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. Applicant has a history of alcohol abuse, including five DUIs. Accordingly, Alcohol Consumption Disqualifying Conditions (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 here.

Applicant credibly testified that he has been sober and alcohol-free since 2001. However, he did have a couple of beers at his house party during the Christmas holiday season in 2004. Enough time has lapsed for me to conclude that Applicant is rehabilitated and continuing to maintain an alcohol-free existence. He has independently decided to continue attending AA and finds that it motivates him to stay alcohol-free. Thus, Alcohol Consumption Mitigating Condition (AC MC) E2.A7.1.3.1 (*the alcohol-related incidents do not indicate a pattern*) does not apply. However, AC MC E2.A7.1.3.2 (*the problem occurred a number of years ago and there is no indication of a recent problem*) and AC MC E2.A7.1.3.3 (*positive changes in behavior supportive of sobriety*) apply. Applicant has mitigated the Government's concerns. Accordingly, allegation 2.a of the SOR is concluded for Applicant.

## **Personal Conduct**

Personal conduct is always a security concern because it asks the central question whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Prior to completing his SF 86, Applicant decided that he needed to correctly fill out the information about his numerous DUIs. On October 27, 2003, he received a transcript of his driver's history, which indicated "11 year record." Consequently, he used that document to assist him in completing his SF 86. The document contained information on DUI convictions in 1993, 1995, and 2001. The document did not have any convictions listed before 1993. Applicant knew that he had at least one DUI in the 1980s, so on the SF 86, he guessed a month and year. Obviously, his guess was way off the mark as he did not recall the two DUIs in 1984 and 1985 as alleged in the SOR. Applicant did not deliberately omit or falsify relevant and material facts when he completed his SF 86. He made a good-faith effort to answer the question correctly. Thus, none of the Personal Conduct Disqualifying Conditions apply. Applicant has mitigated the Government's case. Accordingly, allegation 3.a is concluded for Applicant.

I have considered all the evidence in the case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Applicant is a mature person, who is well on his way to living an alcohol-free lifestyle. He has changed friends and continues to frequent AA meetings. He has decided that to be sober is important in preserving his current lifestyle, his professional career, and a solid relationship with his family and friends. Based on the evidence of record, however, it is clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, I conclude Applicant is suitable 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:

Paragraph 1. Guideline J (Criminal Conduct): 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

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i: For Applicant

Paragraph 2. Guideline G (Alcohol Consumption): FOR APPLICANT

Subparagraph 2.a: For Applicant

Paragraph 3. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 3.a: For Applicant

### **DECISION**

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

Jacqueline T. Williams

Administrative Judge

1. Gov. Ex. 1 (Security Clearance Application, dated December 12, 2003).
2. Tr. 56.
3. Tr. 8.
4. Tr. 99.
5. Tr. 99-100.
6. Tr. 20-32.
7. Tr. 34-38.
8. Tr. 35.
9. Tr. 38.

10. Tr. 39-41.
11. Tr. 44.
12. Tr. 44.
13. Tr. 46.
14. Tr. 51-58.
15. Tr. 54.
16. Tr. 55.
17. Tr. 56.
18. Tr. 56-58.
19. Tr. 78.
20. Tr. 73-74.
21. Tr. 77.
22. Tr. 103, 113.
23. Tr. 111.
24. Ex. E (Character Statements).
25. Ex. D (Letter from Licensed Clinical Social Worker, dated October 17, 2006).
26. ISCR Case No. 96-0277 (July 11, 1997) at 2.
27. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
28. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
29. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
30. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
31. *Egan*, 484 U.S. at 531.
32. *Id.*
33. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
34. Executive Order 10865 § 7.