

DATE: March 27, 1997

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In re:

SSN:

Applicant for Security Clearance

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ISCR Case No. 96-0805

## **DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

Barry M. Sax, Esq.

Department Counsel

#### **FOR THE APPLICANT**

P. Michael Shanley, Esq.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, dated February 16, 1996, issued a Statement of Reasons (SOR) dated November 5, 1996, to the Applicant which 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 the Applicant and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

On November 25, 1996, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned to this Administrative Judge on January 15, 1997, on a transfer due to workload considerations. On January 16, 1997, a hearing was scheduled for February 12, 1997. At the hearing, the parties offered an agreement and stipulation which was marked and entered as Joint Exhibit 1. Pursuant to this agreement, five Government exhibits (numbered 1 through 5) and five Applicant exhibits (A through E) were admitted into evidence. The Government stipulated at the hearing to the admission of two additional Applicant exhibits (F and G) which were not included in the original agreement. Testimony was taken from the Applicant and four other witnesses who testified on his behalf.<sup>(1)</sup> A transcript of the hearing was received by this office on February 28, 1997.

### **FINDINGS OF FACT**

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge renders the following findings of fact:

Applicant is a 34 year old ----- who has worked for his current employer, a defense contracting firm (company A), since February 1996. He seeks a security clearance for his duties there.

Although Applicant tried beer as a fifteen year old, he did not begin to drink alcoholic beverages until his senior year of high school when he would consume three or four beers a couple times a month. It did not affect his studies and he graduated as salutatorian of his class. After graduation, Applicant pursued further study in a community college. Over the 1981 to 1983 time frame, Applicant imbibed three to four beers twice a week. As an undergraduate student in a four year computer engineering program over the period 1983 to 1986, Applicant drank three to four beers per week.

On earning his Bachelor of Science degree in May 1986, Applicant began working full time at the company where he had co-op experience as an undergraduate. He started socializing with co-workers a couple of times a month, consuming from three to twelve beers over the course of an evening. Once or twice per week, he imbibed a beer or wine at home. Approximately once per year, he drank as much as twenty-four beers in a twelve hour period. On a couple of occasions prior to 1994, he operated a motor vehicle after drinking to intoxication.

After work on March 17, 1994, Applicant met a co-worker at a bowling alley where he drank a beer at around 7:00 p.m. They then went to three separate pubs where Applicant imbibed two beers at each establishment, finishing drinking at around 11:00 p.m. Applicant gave his friend a ride home and proceeded to his residence. En route, he was stopped by the state police for failure to keep right. Detecting a strong odor of alcohol and bloodshot eyes, the officer administered field sobriety tests and a breathalyser. Unable to complete the field sobriety tests and with his blood alcohol content testing at .13%, Applicant was arrested at 12:05 a.m. on March 18, 1994, for driving while intoxicated (DWI) and failure to keep right. At the station, Applicant took a second breathalyser with the same result. On May 4, 1994, Applicant pleaded guilty to a reduced charge of driving while ability impaired. He was fined \$300.00 plus a \$25.00 surcharge and granted a conditional license for ninety days which allowed him to drive to work. Applicant attended drunk driving classes as required, and after ninety days, his full driving privileges were restored.

After the drunk driving offense, Applicant resolved not to drink and drive. On July 13, 1996, Applicant attended a party at a co-worker's home which was some distance from his residence. Aware that other co-workers were bringing to the party home brewed beers for the others to taste, Applicant arranged with the host of the party to stay overnight at his residence. Applicant consumed twenty-four beers over the course of twelve hours. Toward the end of the party in the early hours of the morning, Applicant learned that a woman with whom he had a three month relationship which ended the week prior would be spending the night in the company of another. Emotionally upset, Applicant decided to drive home even though he was intoxicated. En route home, he was arrested at around 4:15 a.m. on July 14, 1996, for DWI and failure to keep right after he failed field sobriety tests and the breathalyser registered .17% blood alcohol content. The following day, Applicant reported the incident to his employer. On August 23, 1996, Applicant pleaded guilty to DWI and he was sentenced to pay fines and costs of \$608.00 and his driver's license was revoked. The failure to keep right charge was dismissed.

On the advice of his attorney, Applicant underwent an alcohol evaluation at a substance abuse facility (facility B) on July 22, 1996. Applicant was given a provisional diagnosis of alcohol dependence and it was recommended to him that he attend an alcohol education program concentrating on the effects and consequences of continued alcohol use. Prior to his court appearance, Applicant intended to pursue the program. After it became clear to him that his license would be revoked irrespective of whether he attended the program, and where attendance at the sessions would be logistically very difficult to manage, Applicant followed the advice of his legal counsel who told him to forget the treatment.

As of September 9, 1996, Applicant intended to continue to have an occasional drink with dinner, but he would not drink and drive. Applicant consumed alcohol on two occasions since his July 1996 DWI offense: one beer in early September 1996 while he mowed his lawn, and one beer with lunch in mid October 1996 at his residence with his supervisor.

At the recommendation of his attorney, Applicant on November 22, 1996, was evaluated at a substance abuse facility (facility C). Professional assessment was that Applicant did not fall within the diagnostic criteria for alcohol dependence or alcohol abuse, although he was close to an alcohol abuse diagnosis. It was recommended to Applicant that he nonetheless attend twelve weeks of educational group on Tuesday evenings and three individual sessions as authorized

by his employee assistance program to address issues related to his emotions and drinking and driving. Over the December 1996/January 1997 time frame, Applicant attended five individual one hour sessions with a counselor at facility C. Applicant demonstrated frank insight during these sessions and had formulated a realistic balance of lifestyle plans such that the counselor saw no risk to employment standards. With the assistance of his supervisor who has permitted Applicant to stay overnight at his residence on Tuesdays, Applicant as of February 12, 1997, had attended nine group sessions. Applicant has maintained total abstinence as required while in the program.

Applicant does not consider himself to be alcohol dependent. While he recognizes that he can no longer drink to intoxication, he is currently struggling with whether he must remain abstinent or whether he can allow himself to have a glass of wine at holiday dinners.

Applicant has never allowed his off-duty alcohol use to affect his work attendance or performance. Applicant is held in high regard by his current supervisor and company A's facility security officer who have had the opportunity to observe his dedication and reliability since his employ in February 1996.

### **POLICIES**

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See Directive 5220.6, Section F.3. and Enclosure 2.* Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

#### **Alcohol Consumption**

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.

Conditions that could raise a security concern and may be disqualifying include:

- (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
- (4) habitual or binge consumption of alcohol to the point of impaired judgment

Conditions that could mitigate security concerns include:

- (3) positive changes in behavior supportive of sobriety

\* \* \*

Under the provisions of Executive Order 10865 and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw

those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

### CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, this Judge concludes that the Government has established its case with regard to Criterion G.

Applicant presents a history of alcohol consumption from his senior year in high school (circa 1980). Although Applicant imbibed alcohol in college when socializing with friends, there is no indication that his consumption led to legal, social or academic impairment. It was not until he was employed full-time and socializing with co-workers that Applicant consumed alcohol to intoxication, albeit on an infrequent basis. Applicant testified approximately once per year he drank to the level of impairment reached on the occasion of his July 1996 DWI. (Transcript p. 90). On at least four occasions, Applicant drove an automobile after drinking to intoxication.<sup>(2)</sup> His excessive consumption of alcohol on those occasions clearly led to the exercise of questionable judgment, unreliability and failure to control impulses. Those to whom classified material is entrusted must be relied on to safeguard this material both during business and non-business hours. The off-duty abuse of alcohol to intoxication, even on an episodic basis, is incompatible with this duty due to the obvious potential for inadvertent unauthorized disclosure when one is under the influence. Given the recency (July 14, 1996) of Applicant's last drunk driving offense, he bears a particularly heavy, although not insurmountable, burden to demonstrate reform.

In assessing the current security significance of Applicant's abusive use of alcohol, this Administrative Judge must consider the Adjudicative Guidelines pertaining to alcohol consumption. Of the five potentially security disqualifying conditions (DC), DCs 1. and 4. are pertinent. His two drunk driving offenses are alcohol-incidents away from work of the type contemplated within DC 1., and it must be said approximately once per year, Applicant engaged in binge drinking.<sup>(3)</sup> DC 3. (diagnosis by a credentialed medical professional of alcohol abuse or alcohol dependence) is found not to apply, despite facility B's evaluation. The diagnosis was provisional, and only based on a two hour assessment. Moreover, on the addiction severity index, Applicant scored 2.01 which falls into the category of slight problem, treatment probably necessary. The treatment recommended was alcohol education, rather than a rehabilitation program. Furthermore, it was the professional opinion of a certified alcohol counselor at facility C that Applicant does not meet the diagnostic criteria for alcohol abuse or alcohol dependence.

On review of the corresponding mitigating conditions (MC), the repeated alcohol-related incidents and the recency of his DWI offenses (both within the past three years), preclude favorable application of MCs 1. and 2. Applicant's consumption since his last DWI has been limited to two occasions where he imbibed one beer. This represents a

significant reduction in consumption from previous levels, and it is a positive change in behavior. However, Applicant's participation in counseling at facility C is more telling in reform. Although not mandated by the court, Applicant was required to undergo an evaluation in order to have his license reinstated. While his desire to have his license restored was a motivating factor in contacting facility C, Applicant has attended two additional individual sessions beyond the three recommended. Applicant's clinical counselor reports that Applicant was open in their sessions and that he worked hard, resulting in frank insights about himself. He has pursued the group educational program at considerable inconvenience to himself and his supervisor who has permitted him to stay at his residence on Tuesday evenings. He has completed nine of the twelve sessions, and there is no reason to believe he will not attend the final three sessions. Applicant testified credibly and with sincerity that he realizes he can no longer drink to intoxication, but that he is still struggling with whether he must remain completely abstinent or can allow himself to have a drink at holiday dinners. With Applicant aware of the ramifications alcohol abuse can have on his career and personal life, it is likely that should he resume alcohol use, it would be in moderation. A hard-working, disciplined individual who has never allowed alcohol to negatively impact his work performance, Applicant has displayed the same dedication to ensuring there will be no recurrence of abuse. Applicant has clearly made some poor decisions, especially when under emotional stress. The concerns engendered thereby are overcome by the efforts he has made since November 1996 to gain personal insight and learn of the dangers posed by alcohol. Subparagraphs 1.a., 1.b., 1.c., 1.d., and 1.e. are therefore resolved for Applicant.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1. Criterion G: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the 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 Applicant.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. Prior to their testimony, the witnesses, to include the Applicant, were advised of Title 18, Section 1001 (vice 101 as stated in the transcript) of the United States Code.
2. Arrested twice for DWI, Applicant admitted at the hearing that "there were probably a couple of other incidents and times where [he] had been at that level and had drove home." (Transcript p. 91).
3. The Directive does not define the terms habitual or binge. The predominant definition of the noun binge is "a drunken revel," and the term is commonly used in reference to drinking heavily. *See Webster's Ninth New Collegiate Dictionary* (1985). Especially with respect to his most recent July 1996 DWI, Applicant consumed twenty-four beers in a twelve hour period, and as evidenced by the .17% breathalyser result, he was significantly impaired.