

Date: June 5, 1997

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0002

## **DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

Barry M. Sax, Esq.

Department Counsel

#### **FOR THE APPLICANT**

Philip M. Masorti, Esq.

### **STATEMENT OF THE CASE**

On January 14, 1997, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 determine whether a clearance should be granted, continued, denied, or revoked. In an unsworn [\(U\)](#) written statement, dated January 31, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The case was assigned on February 19, 1997, to Administrative Judge Mason, and re-assigned on February 24, 1997, for reasons of caseload reallocations to the undersigned Administrative Judge. The undersigned held a hearing on March 25, 1997. The Department Counsel presented fourteen exhibits ("Exhs") and the testimony of two witnesses. The Applicant presented no exhibits other than those attached to his answer to the SOR and no witnesses other than himself. The undersigned Ad-ministrative Judge received the transcript ("Tr") of the hearing on April 8, 1997.

### **RULINGS ON PROCEDURE**

At the outset of the hearing the parties were informed that official notice would be taken of certain pages of the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (1994), or DSM-IV. Those pages were provided at that time to the parties, who had no objection. Tr pages 19-20.

### **FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on a single criterion: paragraph 1, Criterion G (alcohol consumption). The Applicant has admitted the factual allegations contained in subparagraphs 1.a. and 1.d. of the SOR. Except as noted herein, the Applicant's admissions are hereby incorporated as findings of fact.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 60-year-old ----- employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance originally granted him in 1980.

The Applicant drank beer on a daily basis for about 15 years (1981-96) and increased his average daily consumption to two quarts (or a six-pack) of beer during 1993-95. Tr pages 142-144. He sometimes drank in the morning and during lunch breaks as well as during the evening. Exhibits 2, 11; tr pages 174-175. He sought medical help in 1995 for his depressive mood that had begun in about 1993. He also resumed cigarette smoking in about 1993 after having quit smoking for 15 years and was in 1995 smoking two packs of cigarettes a day. Exhibit 9. While never intoxicated or drinking at work, the Applicant on occasion smelled of alcohol at work, but has not since January 1996. Exhibit 14; tr pages 31-34, 37-42, 79-91, 94-96, 120, 159-160, 199. In June or July 1995 he went to his HMO primary care physician because he was tired all the time, had lost weight, slept irregularly, and was worried about his job security; the doctor diagnosed him with depression and high anxiety. Tr pages 108-109. In August-October 1995 the Applicant was diagnosed as suffering from major depression and chronic alcohol abuse.<sup>(2)</sup> Exhibits 9, 11, 12, and 13. His HMO primary care physician discussed with the Applicant "the need to stop using alcohol" and to "start decreasing his alcohol intake." Exhibit 9; tr pages 171-172.<sup>(3)</sup> The Applicant separated from his wife in late 1995. Tr pages 106-107, 145-148, 200-201. They have been married about 39 years.

On January 18, 1996, the Applicant had a one-vehicle accident in the early evening. He had been drinking that afternoon and again at dinner. He drove his pick-up truck into a large tree and totaled the truck. The dispatched local policeman noticed a strong odor of alcohol about the Applicant's person. The Applicant admitted to the policeman that he had drunk 5-6 beers at dinner and failed a field sobriety test the policeman then administered. The Applicant's blood alcohol content (BAC) was tested at 0.321%. Exhibit 5. For the prior 3 months he had taken a prescribed stimulant or antidepressant daily. Exhibit 7; tr pages 178, 209. On January 23, 1996, the Applicant was formally charged with, *inter alia*, Driving Under the Influence of Alcohol (DUI) and failing to drive within a single lane of a roadway laned for traffic. Exhibit 4.

In May 1996 he was placed in a pre-trial diversionary program for first-time non-violent offenders, pleaded guilty to the charge of "disregard traffic lane," was fined \$25 and costs, was required to perform a day of community service and complete an alcohol safe driving course, and was placed on unsupervised probation for 12 months. His operator's license was suspended for 30 days. Exhibit 3; see the Applicant's SOR answer. Tr pages 68-72, 128-129. The Applicant voluntarily attended about 4-5 Alcoholics Anonymous (AA) meetings and went to outpatient counseling during January-July 1996 Exhibit 2; see the Applicant's SOR answer; tr pages 112-113, 155-156, 202-204. Shortly after his DUI the Applicant was diagnosed by another psychiatrist as suffering from "severe depression, aggravated by too much drinking." Tr page 113. The psychiatrist recommended an inpatient 30-day alcohol care program, but the Applicant declined due to job and business responsibilities. Tr page 121. That psychiatrist then prescribed Wellbutrin,<sup>®</sup> an antidepressant, and told him not to drink alcohol at all, especially when taking the prescription medicine. The Applicant did not drink for about six months. Tr pages 110-118, 150-152, 186-18, 210 224. After cessation of that drug intervention, he resumed "occasional" drinking in July 1996, currently drinking 2-3 times a week but no more than 2-3 drinks at time and never at noontime or in the morning. Tr pages 118-119, 132-133, 153-155. He is involved in no programs at the present time to monitor his alcohol use, but should he begin drinking heavily again he would go back to his family and the psychiatrist for support. Tr pages 122-127, 157.

In May 1996, the Applicant received a very good job performance evaluation without any indication of alcohol impact on that performance, and in July 1996 he was recommended for promotion because he "has consistently demonstrated that his abilities far exceed the descriptions of his present grade." Exhibits A and B to the SOR answer. He received the promotion. Tr pages 47, 57, 125. His supervisor testified to the "very unique" capabilities of the Applicant within the

staff. Tr pages 47-48, 73.

## **POLICIES**

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluation of an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### **CRITERION G - 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;
- (3) diagnosis by a credentialed medical professional (cre-dentialed medical professional: licensed physician, licensed clinical psychologist, or board certified psych-iatrist) of alcohol abuse or alcohol dependence;
- (5) consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional (cre-dentialed medical professional: licensed physician, licensed clinical psychologist, or board certified psych-iatrist) and following completion of an alcohol rehabil-itation program

**Conditions that could mitigate security concerns include:**

- (1) the alcohol related incidents do not indicate a pattern;
- (4) following diagnosis of alcohol abuse or alcohol de-pendence, 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, abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional (cre-dentialed medi-cal professional: licensed physician, licensed clinical psychologist, or board certified psychiatrist).

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledgeable participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

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 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 may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below. [\(4\)](#)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. [\(5\)](#)

## 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, the undersigned concludes that the Government established its case with regard to Criterion G.

The evidence in the record reveals the Applicant as a person of mature years--in his 40's--beginning to abuse alcohol around the time he originally was granted a personnel security clearance. He built up a large tolerance for alcohol due to daily consumption. By his late 50's he was drinking about two quarts of beer a day; his 0.321% BAC in January 1996 is remarkable evidence of the extent of that tolerance. While this is evidence of the "habitual consumption of alcohol," there is little evidence that it led "to the point of impaired judgment," in the words of DC #4, possibly because of such tolerance. It simply took increasing large quantities of alcohol before he felt the effects. Nevertheless, motor skills are impaired with high BAC readings, and an attempt to operate a motor vehicle with a high BAC demonstrates poor judgment. On the other hand, the Applicant was able to perform his job at more than a satisfactory level, demonstrating that his mental skills and technical abilities were unimpaired. DC #2, pertaining to alcohol-related incidents at work, is inapplicable to these facts inasmuch as he never drank at work<sup>(6)</sup> and inasmuch as he was never drunk at work or reported to work in an impaired condition. There is evidence that the Applicant on more than a few occasions had the odor of alcohol about his person while at work, which qualifies as "alcohol-related incidents" for purposes of DC #2; yet his job performance evaluation in May 1996 notes that the Applicant "interfaces with numerous vendors and suppliers on a daily basis" and "represents the projects and [his employer] very professionally and effectively." Exhibit A, page 4, to the SOR answer.

The Applicant has had one arrest for DUI. Only one alcohol-related incident away from work does not meet the literal terms of DC #1, identified on page 4 *supra*; only "criminal incidents" fall within the scope of DC #1. Similarly, only one such incident does satisfy the literal terms of MC #1, identified on page 5 *supra*, relating to the absence of "a pattern of alcohol related incidents." On the other hand, even one DUI is a cause for some concern--even where, as here, there was no conviction, yet there is abundant evidence of criminal conduct. MC #2 is inapplicable because the Applicant's alcohol problem did not simply occur "a number of years ago," nor are there "no indications" whatever of a recent problem. MC #3 has little application to the facts because the "positive changes in behavior supportive of sobriety" are relatively modest in light of his continued alcohol consumption and the lack of a current support system, such as Alcoholics Anonymous (AA), to counsel sobriety.

Weight is given to the diagnoses of alcohol abuse both before and after the DUI arrest provided by credentialed medical professionals and the medical advice given to the Applicant to enter an inpatient rehabilitation program and to stop drinking entirely. See DC #3, identified on page 5 *supra*. Additional weight is given to the Applicant's unwillingness to take this professional medical advice. DC #5, identified on page 5 *supra*, is ambiguous as to whether it is strictly applicable when **either** there has been a diagnosis of alcoholism **or** when an alcohol rehabilitation program has been completed, or whether it is applicable only when **both** premises exist. While it is clear that "alcoholism" is psychiatrically different than "alcohol abuse" according to the DSM-IV, the Applicant's consumption of alcohol contrary to the advice he received and the many adverse consequences of his DUI arrest have direct security significance. Clearly, the facts do not suggest the availability of the sort of mitigation outlined in MC #4, identified on page 5 *supra*. In this regard, this Administrative Judge is instructed by the Adjudicative Guidelines (Encl. 2 to the Directive, page 2-3) to consider whether the person "sought assistance and followed professional guidance, where appropriate." Though he sought medical help voluntarily before his DUI arrest, he was dissatisfied with the results of the advice and medication he was given and only returned for additional medical help from a different doctor after his DUI arrest.

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive. Those factors are identified on pages 5-6 *supra*. The Applicant has a serious, lengthy, and continuing alcohol problem that he denies although he has not been intoxicated for the last 14 months or so. The absence of current rehabilitation as well as the recency of his DUI arrest--and, indeed, education in the course of alcoholism--suggest recurring and deepening health problems yet await the Applicant. The lack of meaningful readily-available support in containing his alcohol abuse bodes particularly threatening in light of the diagnosis of major depression without appropriate current drug treatment to deal with it. His maturity must also be discounted as a viable contribution towards mitigation.

## **FORMAL FINDINGS**

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as

amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

## **DECISION**

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

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Jerome H. Silber

Administrative Judge

1. The answer was unsworn, which is contrary to item 4 of the additional procedural guidance (encl. 3 to the Directive). The signature of the answer was acknowledged before a notary public, and the answer's verification clause recites the signatory's understanding that any false statements therein would be subject to penalties of state law "relating to unsworn falsification to authorities."
  2. An unsigned diagnosis of "chronic alcohol dependency" on August 15, 1995, by a psychiatrist in another facility is discounted as the minimum criteria in DSM-IV, page 181, are unsubstantiated by the facts presented by the doctor. Exh.8; tr pages 23-25.
  3. By October 1996, a year later, he had reduced his alcohol consumption to 2-3 beers a night and planned to reduce it to 1-2 beers a night. Exhibit 2.
  4. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:  
  
[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.
- Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).
5. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

6. Drinking at lunch is not *per se* an alcohol-related incident unless it contravenes work rules, interferes with job performance, results in intoxication, *etc.*