

DATE: February 18, 1998

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In Re:

SSN:

Applicant for Security Clearance

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ISCR Case No. 97-0269

## **DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

#### **FOR APPLICANT**

Thomas M. Abbott, Esquire, McKenna & Cuneo

### **STATEMENT OF THE CASE**

On April 11, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended), issued the attached Statement of Reasons (SOR) to (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 determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on May 29, 1997, and requested a hearing. A Notice of Hearing was issued on September 23, 1997. The case was transferred to the undersigned on October 22, 1997.

A hearing was held on October 28, 1997, at which the Government presented six documentary exhibits, and called one witness. Testimony was taken from the Applicant, who also submitted two exhibits. The transcript was received on November 6, 1997.

### **FINDINGS OF FACT**

The Applicant is 33, single, and has a degree from an institute of technology. He is employed by a defense contractor as an electronic technician, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits, and the live testimony.

Paragraph 1 (Criterion G). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he consumes alcohol to excess.

The Applicant has been drinking alcohol to excess on a periodic basis from approximately 1980 to July 1997. His use of alcohol during that span of time ranged from one or two beers a week to twelve beers a week, or more. The Applicant admitted that, at times during this period, alcohol has affected his judgment. (Transcript at 49.)

His first alcohol related incident occurred in October 1983, when the Applicant was 19 years old (SOR subparagraph 1.b.). He was arrested and convicted for Driving While Intoxicated With a Blood Alcohol Count Over .10%. The Applicant did not change his drinking pattern after this arrest. (Transcript at 34-37.)

The next alcohol related incident occurred in February 1992 (SOR subparagraph 1.c.). At this time the Applicant was 28. The Applicant had stopped at a tavern and drank seven or eight beers on his way home from work. He was arrested for Driving Under the Influence of Alcohol. The Applicant pleaded guilty to an amended charge of Reckless Driving. He was given a suspended jail sentence, a fine and one year's unsupervised probation. (See, Government Exhibit 3.) The Applicant admitted that, despite having drunk seven or eight beers, "I didn't think I was too intoxicated driving home." (Transcript at 38.) The Applicant testified that he subsequently changed his drinking pattern, "At that point I didn't drive home if I had too many. If I thought - - you know, had six beers, you know, I might not drive home." (Transcript at 39.)

In August 1996, the Applicant was involved in his most recent alcohol related incident (SOR subparagraph 1.d.). He drank about eight beers during the evening, attempted to drive home, and was arrested for Driving Under the Influence. His blood alcohol test gave a reading of .19%, above the legal limit of .08%. The Applicant plead nolo contendere to the charge of Driving Under the Influence. He was sentenced to 48 hours in jail, a fine, enroll in a First Offender Program, three years probation and his driver's license was suspended for four months. (See, Government Exhibit 4.)

The Applicant credibly testified that, except for a slip in July 1997, he stopped drinking in May 1997. Further, the Applicant attends Alcoholics Anonymous meetings once a week and has a sponsor. The Applicant also testified that he does not intend to drink in the future, as alcohol will not allow him to achieve some goals he has set for himself. (Transcript at 51-52.)

Mitigation. The Applicant presented declarations from his direct and second line supervisors (Applicant's Exhibits "A" and "B"). They each state the Applicant is a good worker who is dependable and reliable. Further, the Applicant's supervisors state that he exhibits good judgment and that they have not seen him under the influence of alcohol at work. Each of them recommends that the Applicant retain his security clearance.

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 and Section F.3. of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

### Criterion G (Alcohol consumption)

#### Conditions that could raise a security concern:

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

#### Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors (General Factors):

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in excessive alcohol use and alcohol related incidents that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

## **CONCLUSIONS**

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a *prima facie* case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's *prima facie* case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by *prima facie* evidence that the Applicant has consumed alcohol to excess and been involved in three alcohol related incidents (Criterion G).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is

sufficient to overcome the Government's *prima facie* case against him, except in part. SOR subparagraph 1.e. alleges that the Applicant continues to consume alcohol. The Applicant credibly testified that, as of the date of the hearing on October 28, 1997, he had not consumed alcohol for almost three months and had no current intent to use alcohol in the future. Accordingly, that subparagraph is found for the Applicant.

However, the rest of the facts of this case do not allow me to find for the Applicant on the other subparagraphs of the SOR or on the main allegation itself. The Applicant has had a serious alcohol problem for many years which he just recently, within six months of the hearing, began to handle. This alcohol problem has affected the Applicant's judgment, as shown by his three arrests for driving under the influence. Given the Applicant's three alcohol related incidents, his long-term drinking pattern, and the recency of his abstinence, it is impossible for me to say at the present time that he is eligible for clearance. The period of his sobriety is simply not long enough for me to say with certainty that he will not use alcohol excessively in the future.

The Applicant's efforts at reform and the positive statements by his supervisors are noted, and he is commended for his decision to refrain from further alcohol use. With continued effort, the Applicant may be eligible for a clearance in the future. Under the particular circumstances of this case, this mitigating evidence does not presently overcome the adverse information that has been presented by the Government.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons. As set forth above, SOR subparagraph 1.e. is found for the Applicant.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: Against the Applicant.

Subparagraph 1.c.: Against the Applicant.

Subparagraph 1.d.: Against the Applicant.

Subparagraph 1.e.: For the 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 the Applicant.

Wilford H. Ross

Administrative Judge