

DATE: December 11, 2007

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In re: )  
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 ----- ) ISCR Case No. 06-26575  
 SSN: ----- )  
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 Applicant for Security Clearance )  
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**DECISION OF ADMINISTRATIVE JUDGE  
ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has a history of security significant offenses during his 20-year tour of military duty for which he either received non-judicial punishment or engaged in otherwise probative conduct, including a positive test for cocaine in 2002. Of added security concern are Applicant's omissions and misstatements in his clearance updates and latest OPM interview. His recurrent history of pattern criminal conduct (inclusive of his omissions and misstatements in the clearance applications and OPM interview he completed) cover an extended period of time (over 20 years in all) and are not mitigated under Guidelines J and E. Clearance is denied.

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**STATEMENT OF THE CASE**

On May 14, 2007, 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, issued a 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 Applicant, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on July 12, 2007, and requested a hearing. The case was assigned to me on October 10, 2007, and was scheduled for hearing on October 30, 2007. A hearing was held on October 30, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of 19 exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) was received on November 7, 2007.

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### **PROCEDURAL ISSUES**

Before the close of the hearing, Department Counsel requested leave to keep the record open to permit counsel to locate a DSS agent to testify regarding Applicant statements in his OPM interview. Department Counsel's request was granted, conditioned on the testimony being enlisted telephonically. Near the close of the hearing, Department Counsel withdrew her request.

Prior to the close of the hearing, Applicant requested leave to supplement the record with character references. There being no objection from the Government, and good cause being demonstrated, Applicant was granted seven days to supplement the record. Within the time permitted, Applicant furnished three character references. There being no objection from the Government, and good cause demonstrated, Applicant's character references are admitted as Applicant's exhibit B.

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### **SUMMARY OF PLEADINGS**

Under Guideline J, Applicant is alleged to have (a) had non-judicial punishment (NJP) imposed on him on four separate occasions between 1984 and August 2000 in cases involving (i) drunk driving and operating an Army vehicle without a driver's license (December 1984), (ii) simple assault and drunk and disorderly conduct (September 1992), (iii) larceny of NAF property (August 2000), and (iv) wrongful use of cocaine (March 2002), (b) been charged with domestic violence/assault (October 1997), which was later dismissed, and (c) falsified his security questionnaires in 1994, 2000, and 2006.

Under Guideline E, Applicant is alleged to have (a) falsified his security clearance questionnaires he executed in 1994, 2000, and 2006, respectively, by omitting his past use of cannabis as determined by a positive urinalysis test conducted in April 1992, his domestic violence domestic violence/assault charge in October 1997, his larceny charge in August 2000, for which he received NJP), his use of cocaine as determined by a positive urinalysis test in November 2001, and his revoked clearance and access to sensitive compartmented information (SCI) by the Army in

August 2002 and (b) his understating the number of times he failed a drug test, omitting his positive cannabis test in April 1992, and misrepresenting the disposition of his August 2000 larceny charges (falsely claiming the charges were dismissed).

For his answer to the SOR, Applicant admitted his 1984 drunk driving and operating without a license charges, his August 2000 larceny charges, and his March 2002 wrongful use of cocaine charges. He denies each and every remaining allegation.

### **FINDINGS OF FACT**

\_\_\_\_\_ Applicant is a 47-year-old training specialist for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant enlisted in the Army in August 1982 and served for 20 years of active duty before his discharge in August 2002 (*see ex. 1*). Following his discharge, he returned home to care for his father and work odd-jobs. While on active duty, he committed a number of offenses for which he received NJP. In December 1984, records reflect that he was charged with DuI and operating without a drivers license (*ex. 7*). He was subsequently awarded NJP, which consisted of a forfeiture of pay in the amount of \$100.00. While Applicant does not recall this arrest or NJP award, he provides no proof of any mistaken identity in the commander's report of discipline (*see ex. 6*).

Four years later (in September 1992), Applicant was charged with simple assault and drunk and disorderly conduct following his acknowledged consumption of alcohol (R.T., at 62-63) and engaging in verbal/physical exchange with his wife. He was assigned seven days of extra duty for his NJP (*see ex. 9*; R.T., at 64-66).

Records reflect that Applicant tested positive for cannabis in April 1992 (*see ex. 18*). After initially the positive test (R.T., at 50-51), Applicant retreated and denied ever testing positive for illegal drugs in April 1992 and denied ever using marijuana after his teens (R.T., at 55). The reported test results reference Applicant's social security number, are probative of the test as reported, and are accepted absent evidence of a chain of custody mixup or other evidence to corroborate Applicant's disclaimers. Whether Applicant was ever apprised of the positive test results is not clear from the test result documentation, but is presumed to have occurred absent evidence of Applicant's change of duty assignment or other circumstances that could have complicated notice of the test results.

In October 1997, Applicant was charged with domestic violence/assault. In a domestic dispute with his spouse (W2), he grabbed her wrist and caused a red mark on her forearm (*see ex. 10*; R.T., at 66-67). Applicant was subsequently apprehended by military police and arrested (*ex. 10*; R.T., at 68-69). W2 declined to prosecute, and the charges were dismissed (*ex. 11*; R.T., at 69).

In August 2000, Applicant was charged with larceny of NAF property after being observed exiting a base commissary without paying for a pair of sunglasses (*see exs. 14 and 15*; R.T., at 70). He was awarded NJP that entailed grade reduction and forfeiture of pay of one month (*see ex. 13*;

R.T., at 70-71). In November 2001, Applicant attended a house party with a friend. During the party he observed some white powder on a table, which he suspected was cocaine (R.T., at 72-73). Without checking the identity of the substance, he sampled it (R.T., at 73). In a random drug test administered by his Army command the following week, Applicant tested positive for cocaine (R.T., at 73). He was awarded NJP by his command in March 2002 for wrongful use of cocaine (*see ex. 16*) and was reduced in grade.

Asked to complete a clearance application (DD398) in February 1994, Applicant answered **no** to ever using illegal drugs (*ex. 3*). In doing so, he omitted both his use of marijuana as a teenager and his testing positive for marijuana in April 1992 (*see ex. 3; R.T., at 75, 77*). Records reflect that Applicant tested positive for marijuana in a test administered by his command (*ex. 18*). He initially acknowledged his positive test and could not explain why he failed to list the positive test in his 1994 DD38 (R.T., at 50-51). Asked again about his omission of his 1992 positive test, he denied any positive drug test in April 1992 (R.T., at 55, 77, and 88). His e-qip omission of his positive April 1992 drug test simply cannot be reconciled with his claims of a good-faith failure to list the positive test under all the circumstances considered. With over 20 years of military experience, Applicant was inferentially aware of DoD's policy against the use of illegal drugs. Acknowledgment of a positive test would clearly constitute adverse information that Applicant could reasonably be expected to want to avoid if he could. Absent any credible explanations that his omission of his marijuana use in his DD 398 was inadvertent or mistaken, inferences can not be averted that his omissions were knowing and wilful.

Applicant was asked to complete another clearance application (SF-86) in January 2000 (*see ex. 2*). In this SF-86, he omitted his October 1997 domestic violence charges. Applicant indicated he does not know why he omitted this 1997 arrest (R.T., at 77). This arrest was both recent and material to his background investigation and is not an isolated omission. When considered as a part of a pattern of omissions of material adverse information, the omission cannot be excused as the result of a good-faith mistake.

Applicant completed his third and last security clearance application (an e-qip version) in January 2006 (*see ex. 1*). In this application, Applicant omitted his administered NJP in August 2000 that resulted from his shoplifting arrest. Applicant's denial of any deliberate intention to omit his larceny charge on his e-qip is not persuasive and warrants an adverse inference of deliberate omission under the evidence presented.

Applicant also omitted his November 2001 positive drug test in the e-qip he completed in January 2006. Responding to question 24 of the e-qip, Applicant answered in the negative to the question that inquired about prior drug use (*see ex. 1*). Applicant attributes his denial to his mistaken interpretation of the question: He claims he interpreted the question to be asking about whether he was a user of drugs, and not one that placed an illegal substance in his mouth on one occasion (R.T., at 86-87). Applicant's claims that his omission was not deliberate are not convincing, and cannot avert inferences of intentional omission.

Applicant omitted other material adverse information in his 2006 e-qip. He omitted both his clearance revocation and withdrawn access to SCI by the Army in May 2002 (*see ex. 19*). Reasons assigned for the Army's 2002 clearance revocation and withdrawn SCI access are contained in the SOR attached to the revocation/withdrawal notice. Referenced adverse information indicated recent

drug use, criminal charges, and alcohol-related incidents. Applicant never responded to the SOR, and the Army issued its final clearance revocation and SCI withdrawal notice based on its compiled reported information (ex. 19). While Applicant claims he never received the SOR or ensuing LOR and denies using illegal drugs (R.T., at 80-81), he provides no proof of address change or other circumstances that could lend light on why he never received the SOR, while still stationed at his military facility in May 2002, or the ensuing LOR before his August 2002 discharge. Still, the SOR and resulting LOR include no written receipt acknowledgments, and it remains at least plausible that with his impending discharge fast approaching, Applicant's command failed to copy him with the pertinent SOR and LOR notices. Considering all of the circumstances surrounding these alleged omissions, Applicant's non-receipt claims are accepted. This being the case, his omission of his clearance revocation and SCI withdrawal is excused.

In the results of interview he certified to in April 2007, Applicant certified to statements he gave to the OPM interviewer in August 2006 (*see* ex. 4). When asked in the 2006 interview about whether he had ever failed a drug test, Applicant stated that the only drug test he failed was in November 2001, and had never used illegal substances since his use of marijuana at age 16 (ex. 4; R.T., at 82). He also claimed to have listed in his 2006 e-qip (*see* ex. 4). To be sure, Applicant not only failed to list his November 2001 positive drug test, but he failed to disclose his April 1992 positive cannabis test as well. At hearing, Applicant initially acknowledged the positive April 1992 drug test (R.T., at 50-51), but could not explain why he failed to mention the test in his interview (R.T., at 51). When asked again about his omission of this April 1992 test, however, he retreated and denied the existence of a positive test in April 1992 (R.T., at 55). Without credible explanations for why he failed to mention his documented April 1992 positive urinalysis (*see* ex. 18) in his 2006 interview, he can not be absolved of his omission of the test in this interview.

In this same 2006 interview he certified to, Applicant told the OPM interviewer that the 2000 shoplifting charges were dismissed, and "because nothing ever really came of it," and he just did not think about it when he filled out his SF-86 (*see* ex. 4). Having certified in his interrogatory response that the information he provided the OPM interviewer in 2006 was correct, his credibility is put to a considerable test when he disclaims the statements he made to the OPM interviewer regarding his understanding of the larceny charges (R.T., at 37-47; 83-86). Absent persuasive corroboration of his disclaimers, his statements lack the requisite credibility to warrant acceptance. Inferences warrant under the circumstances that his interview accounts of this shoplifting charge were made knowingly and wilfully to conceal the NJP he received from his command with respect to the filed charges.

Applicant is well regarded by co-workers who are familiar with his work habits. His assistant team leader, his previous Army superior, and co-workers and former fellow members of his active duty command collectively endorse his leadership skills, professionalism and character (*see* exs. A and B). Each of his references vouch for his integrity and dedication and recommend him for a position of trust and access to classified information.

## **POLICIES**

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision

making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the Mitigating Conditions, if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Criminal Conduct**

*The Concern:* Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

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### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

### **Burden of Proof**

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## CONCLUSIONS

\_\_\_\_\_ Applicant has a considerable history of arrests and charges arising out of assorted alcohol-related incidents, assaults, shoplifting, and cocaine use that resulted in his receipt of NJP in connection with four of the covered incidents. Applicant's recurrent offenses over an 18-year period, coupled with his omissions and misstatements he made in three separate security clearance applications he completed and an ensuing OPM interview he submitted to in August 2006 raise security significant issues about his judgment, reliability and trustworthiness.

### **Arrest/charge issues**

While in military service, Applicant was arrested on five separate occasions over an 18-year period (spanning 1984 and March 2002) for charged criminal offenses. The offenses for which he was charged are varied: DuI (December 1984), simple assault and drunk and disorderly conduct (September 1992), domestic violence/assault (October 1997), larceny of NAF property (August 8000), and wrongful use of cocaine (March 2002). All but one of the charged offenses resulted in NJP. Only his 1992 charged offense of simple assault and drunk and disorderly conduct was initiated in a civilian court, and these underlying charges were dismissed after his wife declined to prosecute. A sixth allegation of criminal conduct did not result in any criminal arrests or charges but derived from his ensuing omissions/misrepresentation in the security clearance applications Applicant executed, and statements given to an OPM interviewer in an interview Applicant sat for in August 2006.

Applicant's recurrent criminal charges and NJP dispositions over an 18-year period are sufficient to invoke four of the disqualifying conditions of the Adjudicative Guidelines for criminal conduct, *i.e.*, DC 31(a) (*a single serious crime or multiple lesser offenses*) and DC 31(b) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Together, these adjudicated offenses and proven actions that reflect conduct covered by Guideline J reflect an unbroken pattern of criminal conduct that spans over 20 years.

Considering the number of accumulated offenses and (six in all, including the SF-86 omissions and ensuing OPM misstatements) over an extended period of time, they cannot be considered either isolated or aged. While each of the offenses assessed alone might warrant mitigation, our Appeal Board has cautioned against considering them in piecemeal. Because of the high regard he is held in by co-workers and supervisors, his actions warrant some application of MC 32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*). It is still too soon, however, to make safe predictions against recurrent conduct, given Applicant's long pattern of charged offenses during his active duty tour in the military and his ensuing omissions/misstatements in his clearance applications and most recent OPM interview.

Taking into account all of the developed evidence of record, Applicant fails to mitigate security concerns associated with his historical pattern of criminally-related charged offenses and omissions/misstatements when asked to provide detailed information about his charged offenses in the clearance applications he completed. Unfavorable conclusions warrant with respect to subparagraphs 1.a through 1.f of Guideline J.

### **Falsification issues**

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's omissions of his domestic violence/assault, shoplifting and positive drug test offenses in the security clearance applications he executed in 2000 and 2006 and the OPM interview he appeared for later in 2006. So much trust is imposed on persons cleared to see classified information that candor lapses cannot be easily excused. Applicable disqualifying conditions comprise DC 16(a) (*deliberate omission, concealment, or falsification of relevant 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*) and DC 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative*).

Mitigation is difficult to credit Applicant with, since he failed to promptly correct his SF-86 omissions and misstatements in a prompt, good-faith manner. In the past, the Appeal Board has denied applicants availability of the predecessor mitigating condition of MC 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) where the applicant has waited many months to timely correct a known omission. Compare ISCR Case No. 97-0289 (Appeal Bd. January 1998) with DISCR Case No. 93-1390 (Appeal Bd. January 1995). Compounding Applicant's omissions is failure to acknowledge his clearance application omissions and ensuing misstatements reported in the OPM agent's summary of interview of Applicant in August 2006.

By minimizing his past involvement in his reported charged offenses and positive test of illegal substances in his clearance applications and ensuing OPM interview, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His attributed reasons for his omissions and misstatements (misinterpretation, lack of recall, and disputing the offense) lack the necessary persuasiveness to be considered sustainable grounds for averting conclusions of falsification. Weighing all of the circumstances surrounding his omissions and misstatements and lack of any prompt, good faith corrections, Applicant fails to mitigate security concerns associated with his judgment and candor lapses in omitting material information in the clearance applications he completed in 2000 and 2006 and most recent OPM interview.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2.2 factors), unfavorable conclusions warrant with respect to subparagraphs 2.b through 2.d and 2.f through 2.g of Guideline E. Favorable conclusions warrant with respect to subparagraphs 2.a and 2.e of the same Guideline.



In reaching my decision, I have considered the evidence as a whole, including each of the E2 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

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**FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, I make the following FORMAL FINDINGS:

GUIDELINE J (CRIMINAL CONDUCT)	AGAINST APPLICANT
Sub-paras. 1.a - 1.f:	AGAINST APPLICANT
GUIDELINE E (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 2.a:	FOR APPLICANT
Sub-paras. 2.b - 2.d:	AGAINST APPLICANT
Sub-para. 2e:	FOR APPLICANT
Sub-paras. 2.f - 2.g:	AGAINST APPLICANT

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**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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley  
Administrative Judge