

DATE: December 31, 2007

In Re:

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SSN: -----

Applicant for Security Clearance

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) ISCR Case No. 05-05277  
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**DECISION OF ADMINISTRATIVE JUDGE  
CHARLES D. ABLARD**

**APPEARANCES**

**FOR GOVERNMENT**

Nichole Noel, Esq. , Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

\_\_\_\_\_Applicant failed to mitigate personal conduct security concerns relating to violation of regulations and agreement to refrain from conduct that might create an impression of impartiality by attempting to obtain a significant pay increase for a domestic partner and pressuring his employer to grant such an increase. He also failed to mitigate security concerns by failing to state on his SF 86 that he had left his employment after allegations of misconduct as a result of investigation of the actions taken to benefit his partner. Clearance is denied.

**STATEMENT OF THE CASE**

On April 13, 2007, the Office of Hearings and Appeals (DOHA) pursuant to Executive Order

10865, *Safeguarding Classified Information Within Industry* 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, 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, received May 11, 2007, Applicant responded to the allegations set forth in the SOR, and requested a decision without a hearing. On May 24, 2007 the government requested a hearing to fully develop the record. The case was assigned to me on August 21, 2007. A Notice of Hearing was issued August 30, 2007 for a hearing held on September 12, 2007. The Government introduced ten exhibits in their case in chief and another four in rebuttal. Applicant introduced 47 exhibits. All were accepted into evidence. A government investigator testified for the government. Applicant and one witness testified on behalf of Applicant. The witness testified by telephone from another city over the objection of the government. The transcript was received on September 20, 2007.

### **FINDINGS OF FACT**

\_\_\_\_\_Applicant denied with explanation the three SOR allegations of personal conduct security concerns relating to his misuse of his authority as a federal employee and failure to report his departure from that employment after investigation for misconduct. After a complete review of the record, I make the following additional findings of fact:

Applicant is a 36-year-old employee of a major defense contractor working as a program manager since September 2004. Before his present employment he was for 18 months a Navy employee working on Foreign Military Sales (FMS) programs as a federal program analyst. Before his federal employment he worked for another defense contractor for four years as an FMS case manager providing technical support for the FMS work. His domestic partner also worked for the same company. When he took his federal government position he was made responsible for management oversight of the work of his former company but in view of possible conflict with the interests of his partner who still worked there, he was restricted pursuant to specific regulatory authority (5 CFR 2635.502, and SPAWAR Instruction 127521B) from having any authority over his work, promotion, or funding (Exh. 3, p. 7, and Exh.10).

As a result of this decision, the supervisory responsibility was divided between Applicant and a colleague with each having responsibility for four specific personnel in the company. The colleague had exclusive responsibility for oversight of Applicant's partner.

Despite the restrictions placed on him and to which he had agreed (Exh. 3, p. 7, and Exh. 5, p.2), in 2003 Applicant began an effort among his colleagues and supervisors to provide substantial pay increases for four employees of the company including his partner (Exh. 7). On January 15,

2004, the partner was terminated by the company for lack of performance and was hired by a competitor company. Ten days later Applicant initiated an effort to terminate the work of the partner's former employer and direct it to his new employer (Exh. 3 p. 20). This was allegedly in retaliation for the failure to obtain the pay increases for the four persons (Exh. 3 p. 25).

An inspector general's hotline complaint on January 30, 2004, initiated a lengthy investigation of Applicant by the Navy Inspector General which was completed on June 1, 2005 (Exh. 3). He submitted statements to the investigator (Exh. B 9 and 32). The investigation revealed that there was no basis for the action attempted against the partner's former employer. It concluded that Applicant had broken his agreement to refrain from any supervisory influence over his partner.

As a result of the investigation, Applicant was assigned on February 9, 2004, to other work for the Navy in a policy position (Exh. 11, p. 8). He resigned seven months later on September 26, 2004, and went to work for his present employment the following day. When he filed his application for a security clearance on February 2, 2005, (Exh. 1), he answered in the negative to Question 20 Your Employment Record relating to leaving a job by mutual agreement following allegations of misconduct, or unsatisfactory performance, or unfavorable circumstances.

Consideration has been given by the U.S. Attorney's office to prosecution of Applicant under 18 U.S.C § 208 which provides that a federal employee may not participate through recommendation in a contract in which he or his spouse has a financial interest. Also considered was prosecution for extortion under 18 U.S.C. § 208. Prosecution was declined by the U.S. Attorney for budget considerations (Report of Adverse Information Exh. 5).

Applicant has held a security clearance since April 2002. He is well regarded by some colleagues at this former employer and at his present employer (Exh. 42) where he has been promoted over the past two years (Exh. B 41). He was interviewed and submitted an eleven page statement to the investigator from the Office of Personnel Management in connection with the investigation of his security clearance application (Exh. 2).

The evidence submitted and testimony by Applicant raised a number of issues, such as whether the pay increases for the four employees were justifiable, the fact that others in addition to his partner were to receive them, the competence of the partner's employing company, and whether Applicant himself might have benefitted from the pay increase for his partner since they shared some household expenses. None of those subjects are relevant to the issues raised by the SOR and it is unnecessary to rule on them.

## **POLICIES**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to control access to

information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information.” *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. -----Security clearances are granted only when “it is clearly consistent with the national interest to do so.” Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

\_\_\_\_\_Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance. “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” ----- “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

The revised Adjudicative Guidelines (AG) are applicable to cases with an SOR dated after September 1, 2006. The Government established each of the allegations under Guideline E Personal Conduct alleged in the SOR. Such conduct might indicate questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information (AG 15). The specific conditions applicable to this case are AG ¶ 16 d (3) involving rule violations, and AG ¶ 16 (a) concerning Applicant’s deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire used to conduct investigations or to determine security clearance eligibility.

Mitigating conditions (MC) that might be applicable include under AG ¶ 17(a) that the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts, and under AG ¶ 17(c) if the fact that the offense is so minor, or so much time has passed, or happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.

Applicant was well aware of the restrictions placed on him regarding oversight of his partner. He violated those restrictions by seeking to obtain a substantial pay increase for him and then retaliating against the partner’s employer when those efforts failed.. He also was aware of the investigation of his conduct but had transferred to another job for seven months when he resigned to take his present position. Apparently he was performing well but was not in a field that he enjoyed

(Exh. 2). He also realized that there would be some “stigma” relating to the events that led to the investigation and conclusions if he stayed on in his government employment (Exh. 2, p. 8). Thus, while his departure was his decision and not as a result of his being discharged, it was under circumstances that required it to be reported at Question 20 since he had left his employment after allegations of unsatisfactory performance in his former work assignment. No mitigating conditions apply.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person’s trustworthiness and fitness for access to classified information. The “whole person” concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

In evaluating Applicant’s behavior in terms of the “whole person concept”(AG ¶ 2), an applicant may mitigate security concerns by demonstrating the factors leading to the violation are not likely to recur(¶ 9), and evidence of rehabilitation and other permanent behavioral changes (¶ 6). The incidents that gave rise to this proceeding may not be likely to recur. However, the SOR allegations all relate to the security clearance process and his willingness to follow government rules that affect honesty and integrity of the workplace and candor and accuracy in providing responses to security clearance applications..

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude a security clearance should not be granted to him.

### **FORMAL FINDINGS**

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline E:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant

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### **DECISION**

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

Charles D. Ablard  
Administrative Judge