

DATE: May 23, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-03357

## **DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jason Perry, Esquire, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant was investigated for several acts of improper behavior in the workplace and unauthorized use of government property while employed as a civilian machinist by his state's air national guard. The investigation was closed due to insufficient evidence for criminal prosecution; however, it presents sufficient reliable adverse information to disqualify him from holding a clearance. Applicant also deliberately omitted relevant information from a sworn statement he gave after a subject interview with government investigators. He has failed to present sufficient evidence to mitigate, extenuate, or refute the government's case. Clearance is denied.

### **STATEMENT OF THE CASE**

Having reviewed the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On October 27, 2003, in accordance with DoD Directive 5220.6, as amended (Directive), DOHA issued to Applicant a Statement of Reasons (SOR)<sup>(2)</sup> alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct). On December 1, 2003, Applicant answered the SOR (Answer), denied all the allegations, and requested his case be decided without a hearing.<sup>(3)</sup>

DOHA Department Counsel submitted a file of relevant materials (FORM) in support of the government's preliminary decision, a copy of which Applicant received on October 7, 2004. Applicant responded to the FORM on October 5, 2004. The case was assigned to me on December 20, 2004. However, Applicant's response to the FORM was not included in the case file when I received it and he was asked to resubmit his response, which he did on May 9, 2005.

### **FINDINGS OF FACT**

Applicant's aforementioned admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 53 years old and employed by a defense contractor as a general mechanic for maintenance of Army helicopters. Before being hired for his current job in 1997, Applicant worked for the U.S. Air Force in a state air national guard (ANG) maintenance squadron command as a civilian machinist / welder from 1979 until 1997. Applicant has been married for over 30 years and has three grown children.

Applicant served in the U.S. Navy from 1971 until 1978. After leaving the Navy as a petty officer second class (paygrade E-5), he affiliated as an enlisted man with the same ANG command where he worked as a civilian. He worked in that organization in the same skill set and at the same work site as in his civilian job. In his civilian capacity, Applicant was solely responsible for daily operations of a machine and welding shop. During regular work days (Monday through Friday), Applicant provided welding services as required and was the only full-time employee at the shop. As such, he was responsible (without apparent supervision) for maintenance and accounting of all property and consumables in the shop. ANG reservists, including Applicant, also worked at the shop, but only during their monthly drill weekends or when assigned there for required annual two weeks training.

From December 1995 through August 1996, the Air Force Office of Special Investigations (AFOSI) investigated Applicant and his workplace in response to complaints that government property was being misused or stolen, that unauthorized work was being performed there, and that other improper activities occurred there.

During Applicant's tenure at the maintenance squadron, he had a history of non-compliance with Air Force regulations regarding cleanliness and safety in the workplace, and with his dress and appearance.

Applicant set up his own photographic equipment in the workplace that had no reason to be there other than for personal benefit. He also posted photos of nude women in the workplace, at least one of which was taken in the workplace. On one occasion, base security police were called to remove an unauthorized female visitor from Applicant's workplace.

Applicant took government-owned tools home on several occasions between 1986 and 1996. When confronted by his superiors about this, Applicant either blamed any discrepancies on the drilling reservists who worked in the shop during their monthly drill weekends or reluctantly returned the item(s) in question.

Applicant performed unauthorized repairs on friends' property (e.g., lawn mowers, chairs, et.) in the shop. He performed these acts oftentimes while there was a backlog of work orders to be done for the command.

Applicant owned several handguns and other firearms, one of which he occasionally brought to the workplace. Some of Applicant's co-workers felt Applicant was capable of violence in response to efforts to discipline him for misconduct.

Whenever any corrective or punitive action against Applicant was attempted in response to alleged misconduct, Applicant would file workplace discrimination grievances through his union or would file law suits directly against his supervisors.

When Applicant submitted a security clearance application (SF 86) in March 1999, in response to question 40 he listed his involvement in four civil actions. However, he omitted his involvement in the aforementioned discrimination grievances and a 1996 job discrimination lawsuit, which was eventually dismissed with prejudice. When interviewed by a Defense Security Service (DSS) agent in October 2000, Applicant described the four suits he listed in the SF 86, but denied involvement in any other civil actions. In response to the allegation in SOR ¶1.c that his statement to DSS in this regard was a deliberate falsification, Applicant has claimed he thought he only had to list a lawsuit if it reached a final conclusion.

In April, 1996, Applicant was recommended for non-retention in the ANG due to poor performance, lack of necessary expertise, and abuse of and failure to properly manage resources. Applicant's appeal of the recommendation was denied and he was subsequently given an honorable discharge with 17 years of service. The following year, Applicant left his civilian ANG position. Around this time, AFOSI concluded it did not have sufficient evidence to pursue a criminal prosecution of Applicant. In light of Applicant's discharge from the ANG, it closed its investigation in August 1996.

Attached to Applicant's Answer are several personal recommendations and awards from both his civilian and military

tenure with the ANG maintenance squadron. The awards are the type a service member might accrue throughout a career and reflect that Applicant was a volunteer in the community and was technically sufficient in his skill set. Several of the letters of recommendation appear to have been drafted in support of his appeal of the non-retention recommendation. The letters specifically address Applicant's abilities as a welder and his management of resources. However, they do not address the allegations of misconduct contained in the SOR as documented in the AFOSI report of investigation (FORM, Item 7).

During Applicant's background investigation, he was interviewed at least twice by DSS and provided two written, sworn statements to investigators. His statement in August 2001 focused on the 1996 AFOSI investigation. Applicant denied the allegations raised in the investigation, but indicated he would not submit to a polygraph to resolve any investigative discrepancies.

### **POLICIES**

The Directive sets forth adjudicative guidelines<sup>(4)</sup> to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed in the Directive under Guideline E (personal conduct).

### **BURDEN OF PROOF**

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(5)</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden, it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.<sup>(6)</sup>

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.<sup>(7)</sup>

### **CONCLUSIONS**

Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.<sup>(8)</sup> Here, the government questions Applicant's judgment because of the AFOSI investigation, and doubts his trustworthiness because it appears he deliberately made a false statement to a government investigator during a subject interview.

At the outset, I find no support in this record for the allegations in SOR ¶1.a(3)<sup>(9)</sup> and ¶1.a(4).<sup>(10)</sup> Further, the only support for the allegation in SOR ¶1.a(2)<sup>(11)</sup> is a summary of an interview of one witness by AFOSI containing double hearsay about how Applicant obtained his job. While hearsay is often considered in these proceedings, I am unwilling to find support in this allegation owing to the attenuated source of the adverse information. Whereas there are multiple accounts of witnesses to support other SOR allegations, this allegation is uncorroborated elsewhere in the record.

Combined with information in Applicant's Answer regarding his abilities as a welder and mechanic, I conclude there is insufficient support for this particular allegation.

As to the remaining allegations in SOR ¶1.a,<sup>(12)</sup> I conclude the record sufficiently supports them and presents reasonable doubts about Applicant's suitability for continued access to classified information. Unlike the allegation regarding Applicant's job qualifications, the AFOSI report of investigation (Item 7) contains multiple references to these events including eyewitness accounts. Additionally, Applicant has admitted to some of these allegations.

As to the allegation in SOR ¶1.b, the government has failed to establish a link between the AFOSI investigation and the recommendation for non-retention. While Applicant's non-retention in the ANG after 17 years service is an adverse personnel action that reflects poorly on his suitability for clearance, the stated basis for this decision does not include the AFOSI investigation results. As written, the SOR ¶1.b allegation has not been established.

Finally, I conclude SOR ¶1.c against the Applicant. Based on the investigative information from AFOSI (Item 7) to the effect that Applicant filed multiple workplace grievances and at least one civil suit against his superiors, and in light of his statement to DSS (Item 5), after having discussed other civil actions between Applicant and others with whom he disagreed, I do not regard as plausible Applicant's explanation<sup>(13)</sup> he thought he had to declare only suits that reached a verdict. While his explanation might reasonably explain away any intent to falsify his SF 86, it is clear from Item 5 he and the DSS agent were discussing any such actions Applicant may have been involved with.

Based on the foregoing, the government has established a *prima facie* case for disqualification under Guideline E. Specifically, disqualifying condition (DC) 1,<sup>(14)</sup> DC 3,<sup>(15)</sup> and DC 5<sup>(16)</sup> apply here. By contrast, Applicant has provided information to support his contention that he was qualified to do the job for which he was hired by the ANG, and that his tenure with the ANG might be characterized as generally positive. However, in response to the SOR allegations, he has simply proffered his denials. Without more, and in light of the facts of this case, there is no basis for application of any of the Guideline E mitigating conditions. Accordingly, I conclude Guideline E against the Applicant.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. Despite the many accolades Applicant garnered while with the ANG, reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant failed to provide, I cannot conclude he has overcome the government's case.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.a(1): Against the Applicant

Subparagraph 1.a(2): For the Applicant

Subparagraph 1.a(3): For the Applicant

Subparagraph 1.a(4): For the Applicant

Subparagraph 1.a(5): Against the Applicant

Subparagraph 1.a(6): Against the Applicant

Subparagraph 1.a(7): Against the Applicant

Subparagraph 1.a(8): Against the Applicant

Subparagraph 1.a(9): Against the Applicant

Subparagraph 1.a(10): Against the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: Against 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. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Item 1.
3. Item 3.
4. Directive, Enclosure 2.
5. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
6. *See Egan*, 484 U.S. at 528, 531.
7. *See Egan*; Directive E2.2.2.
8. Directive, E2.A5.1.1.
9. That Applicant tried to fraudulently obtain workman's compensation benefits.
10. That Applicant was involved in the destruction of AFOSI surveillance cameras.
11. That Applicant misrepresented his qualifications in order to obtain his job with the ANG.
12. 1.a(1) Applicant ran a photography business in the workplace; 1.a(5) Applicant took government tools and other property home without authorization; 1.a(6) Applicant performed unauthorized repairs for friends using government property; 1.a(7) Applicant's authorization to order supplies and other materials was placed under extra review by his superiors because of his mismanagement of resources; 1.a(8) Applicant brought women into the workplace without authorization and, on at least one occasion, photographed a nude woman in the workplace; 1.a(9) Applicant brought a personal weapon into the workplace; 1.a(10) Applicant has a history of workplace rules violations and non-compliance with authority.
13. Answer.
14. Directive, E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;
15. Directive, E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material

matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination;

16. Directive, E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;