

DATE: August 17, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-03633

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

**APPEARANCES**

**FOR GOVERNMENT**

Mark Curry, Department Counsel,

Peregrine Russell-Hunter, Chief Department Counsel

**FOR APPLICANT**

Frederick D. Cooke, Esq.

**SYNOPSIS**

Applicant was arrested in March 1998 after his 14-year-old sister called the police when she became upset by his efforts to supervise her weekend activities. Although he remained in police custody for more than 24 hours, no charges were ever filed against him. Applicant's involvement in this incident and his failure to list the arrest on his SF 86 (*Security Clearance Application*) are mitigated by his exculpatory explanation of the circumstances of the arrest, and by the absence of evidence his arrest involved misconduct which impugns his judgment, trustworthiness, or reliability. Clearance is granted.

**STATEMENT OF THE CASE**

On February 17, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, 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 finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended referral to an Administrative Judge to determine whether he should be granted a security clearance.

Applicant answered the SOR in writing on March 5, 2001, and requested a hearing before a DOHA Administrative Judge. The case was reassigned to this Administrative Judge because of caseload considerations on June 18, 2001, after having been previously assigned to another Administrative Judge. On July 19, 2001, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to grant Appellant's security clearance. The Government's case consisted of three exhibits and one witness. Applicant relied on his own testimony. A transcript (Tr) of the proceeding was received on July 26, 2001.

## FINDINGS OF FACT

In his answer to the SOR, Applicant admitted, with explanations, all allegations set forth in the SOR. I accept Applicant's admissions and explanations, and after a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 28-year-old electrical engineer who has been employed by a DoD contractor since September 1999. He received his BS in Electrical Engineering from University A in December 1998 and his MS in Electrical Engineering from University B in August 1999. He is currently working toward a degree in Computer Science at University C.

Applicant's involvement in a single, unfortunate incident was the precipitating cause of all allegations set forth in the Statement of Reasons. That incident occurred in March 1998 when Applicant was arrested because of a misunderstanding with his 14 -year-old sister, for whom he had guardianship responsibilities. In testimony at his administrative hearing, he provided the only account of this incident which appears in the record.

...to make a long story short, my younger sister had a couple of boys over the house that she wasn't suppose to have. I asked them to leave and my sister didn't like that at all. She got very upset. We got into an argument and we got into a confrontation and she called the police. She exaggerated and fabricated some things because she was upset with me. And the police took me away and they held me overnight. When I was released I was told that the case was no paper, I went to a judge and he told me to leave. There wasn't actually any proceeding or anything, so I didn't think that it was. I would actually have an arrest record for the fact that my sister, from what I found out later on, actually told that she was just upset and that, I don't know that the legal term of the case was thrown out or dropped or whatever, but, as far as I knew then, that is what I believed happened. <sup>(1)</sup>

Tr. 20

Other than Appellant's account, the only evidence of this incident in the record is a very brief entry in FBI records under the name of Applicant:

Arrested or received (date of arrest)

Charge 1 - simple assault

Court-

Charge-simple assault

Sentence-

(Date) No paper

There is no police report and no descriptive information of this incident from any source other than Applicant.

When Applicant completed his *Security Clearance Application* (SF 86) in October 1999, he answered "no" to question 26 which asked if "in the last 7 years" he had "been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25." <sup>(2)</sup> Applicant had already answered "no" to each of the questions posed in modules 21, 22, 23, 24 and 25, thus denying he had been arrested for any offense during the previous 7 years.

Later when Applicant was interviewed by the Defense Security Service (DSS) in July 2000, he admitted the March 1998 arrest, but explained he had not listed the arrest because "there was no charge and the case was dismissed" (Gov. Exh. 2). While Applicant has subsequently learned he was required to list the March 1998 arrest (in response to question 26), he adamantly insists he did not believe information about the March 1998 incident was responsive to question 26 (of the *Security Clearance Application*) at the time he completed the form.

Applicant's explanation for why he did not list the March 1998 arrest is credible because he had no motive to lie. He

believed at the time and continues to believe he was arrested because of a misunderstanding with his sister. He insists he had not done anything illegal to warrant being arrested, and there is no evidence in the record to challenge his claimed innocence. His explanation for not listing the March 1998 arrest in response to question 26 is reasonable--given the circumstances of his arrest and the subsequent dismissal of the matter with "no paper." If he had believed he was required to list this arrest, he could and would have listed it and provided the same unchallenged, exculpatory explanation he has given several times since then. He did not list the arrest because he honestly believed information about this incident was not responsive to question 26 and the information which this question seeks to elicit.

The record does not include any information about Applicant's duty performance.

### POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Sections 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

### CRIMINAL CONDUCT

#### (Guideline J)

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

#### **Conditions that could raise a security concern and may be disqualifying include:**

E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged:

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

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.2. The crime was an isolated incident;

E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.

### PERSONAL CONDUCT

#### (Guideline E)

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwilling to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

#### **Conditions that could raise a security concern and may be disqualifying include:**

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material 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, award

fiduciary responsibilities.

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

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

**Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden or persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden or persuasion to demonstrate he is nonetheless security worthy. As noted by the *United States Supreme Court in Department of Navy v. Egan*, 484 U.S. 518 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

**CONCLUSION**

Having considered the record evidence in accordance with the appropriate legal precepts and guidelines, this Administrative Judge concludes the Government has established its case with regard to Guideline J, but has not established its case with regard to Guideline E. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section 6.3, as well as those referred to in the section dealing with the Adjudication Process, both in the Directive.

A security concern is raised by Applicant's arrest for simple assault in March 1998. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

The security concern raised by Applicant's March 1998 arrest is mitigated by the circumstances of that arrest and by the fact no charges were ever filed against him. Applicant has credibly explained he was arrested on a Saturday evening after his 14-year-old sister became upset because he had objected to her having male visitors. She called the police. The police arrested Applicant and held him for more than 24 hours. He was released on the following Monday morning without any charges ever being filed against him. This arrest was an isolated incident which occurred more than three years ago (E2.A10.1.3.1. and E2.A10.1.3.2.). Accepting his version of events, which has not been challenged, Applicant arguably was involved in conduct leading up to the arrest involuntarily because of his efforts to appropriately supervise his younger sister.

Applicant's failure to list the above arrest in response to question 26 on the his *Security Clearance Application* is not found to raise a security concern under Guideline J for the reasons set forth below. Guideline J is concluded for Applicant.

The evidence does not establish Applicant deliberately omitted material facts from the *Security Clearance Application* (SF 86) which he completed in October 1999 (Gov. Exh. 1). He has credibly explained he did not list the March 1998 arrest in response to question 26 because he did not believe information about an incident which was dismissed with "no paper" was responsive to the question and the information which the question sought to elicit.

Moreover, even if Applicant's explanation for not listing the arrest is rejected, the security concern raised by Applicant's "no" answer to question 26 is mitigated by the fact the information omitted from the questionnaire was not pertinent to a determination of judgment, trustworthiness, or reliability (E2.A5.1.3.1.). Applicant was arrested in March 1998 when his 14-year-old sister became upset and called the police after he attempted to supervise her weekend activities. Although he remained in police custody for more than 24 hours, no charges were ever filed against Applicant because of

this incident. There is no evidence in the file, Applicant did anything illegal prior to being arrested, and his exculpatory explanation for the circumstances of the arrest is corroborated by the dismissal of the matter and by the brief entry in the FBI records. There is no evidence in the record Applicant was involved in misconduct in March 1998 which impugns his integrity and raises questions about his judgment, trustworthiness, or reliability. Guideline E is concluded for Applicant.

### **FORMAL FINDINGS**

Formal findings as required by Section 3, paragraph 7, of enclosure 1 of the Directive, are hereby rendered as follows:

Paragraph 1 (Guideline J) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Paragraph 2 (Guideline E) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. Applicant had earlier provided nearly identical accounts of this incident to the Defense Security Service (DSS) in July 2000 and again in his answer to the Statement of Reasons.
2. Applicant had also answered "no" to the questions posed in modules 21, 22, 23, 24, and 25.