

DATE: February 13, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-05518

## **DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Howry, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's filing of a false claim with a Government agency resulting in a conviction in March 2000, for a violation of 18 United States Code, Section 1001, a felony, has not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

### **STATEMENT OF THE CASE**

On August 8, 2002, 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, (as amended ) issued a Statement of Reasons (SOR) to the 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 clearance should be denied or revoked.

The Applicant responded to the SOR in writing on August 23, 2002, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on December 9, 2002. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on December 30, 2002, and he submitted a reply dated January 24, 2003.

The case was assigned to the undersigned for resolution on January 31, 2003.

### **FINDINGS OF FACT**

The Applicant is 54 years old. He is employed by a defense contractor and is seeking to retain a security clearance in connection with his employment.

The Government opposes the Applicant's request for a continued security clearance, on the basis of 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:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant filed a false claim with the Federal Emergency Management Agency (FEMA). During a period while he was employed full time, the Applicant was advised by a friend to go down to FEMA, and apply for disaster unemployment assistance following Super Typhoon Paka in Guam. The Applicant applied for and received assistance from December 1997 to May 1998, based upon his claim that the Typhoon destroyed his crop.

In his statement to the Defense Security Service (DSS), dated March 19, 2002, the Applicant explained that he was also a farmer during the time of the Typhoon and he lost some of his crop. He did not know that he was not eligible for the assistance when he applied. He later learned that the assistance was provided for only those individuals who were unemployed at the time. In March 2000, the Applicant pled guilty to one count of False Statement to a Government Agency, a felony, and was placed on probation for 36 months. He was given 200 hours community service, and was ordered to pay restitution in the amount of \$2,424.00. The Applicant has completed his probation, community service and he has paid the restitution.

Paragraph 2 (Criterion E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant completed a Security Clearance Application on July 14, 1999. In response to question 23(a), which asked, "Have you ever been charged with or convicted of any felony?," to which the Applicant answered "NO." (See, Government Exhibit 4, Question 23(a)). It is impossible for the Applicant to list the charge and conviction in his July 1999 security application that did not occur until March 2000. Accordingly, I find that the Applicant's response to question 23(a), on his security clearance application of July 14, 1999, was not a deliberate attempt to conceal material information from the Government.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

### Guideline J (Criminal Conduct)

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

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses;

#### Conditions that could mitigate security concerns:

None.

### Guideline E (Personal Conduct)

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

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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

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 per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct and dishonesty which demonstrate poor judgment or unreliability.

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 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 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 evidence that the Applicant has engaged in serious criminal conduct (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

The evidence shows that the Applicant's recent, serious criminal conduct cannot be ignored. In March 2000, he was

convicted of making a false statement to a Government agency, which is a violation of 18 United States Code, Section 1001. The crime committed by the Applicant goes directly to the heart of the Defense Security Program in that it involves falsification of a Government document. This is a felony offense. Under these circumstances, the Applicant cannot be trusted. At this time, I cannot find that the Applicant is sufficiently rehabilitated in the area of criminal conduct to warrant the granting of a security clearance. Accordingly, Guideline J (Criminal Conduct) is found against the Applicant.

As previously discussed, the record contains no evidence that establishes that the Applicant was charged or convicted of a felony before he completed his security clearance application in July 1999. In fact, the Applicant had not been charged or convicted of a felony when he filled out the security clearance application in July 1999. As such, I do not find that the Applicant deliberately provided false information to the Government on his security clearance application in answer to question 23(a). Accordingly, Guideline E (Personal Conduct) is found for the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons. As stated above, paragraph 2 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.

Subpara. 1.a.: Against the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: 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.

**DARLENE LOKEY ANDERSON**

Administrative Judge