

DATE: August 14, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-08390

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

William S. Fields, Esquire, Department Counsel

**FOR APPLICANT**

William R. Spencer, Esquire

**SYNOPSIS**

Applicant's conduct raises security concerns over his repeated problematic and misguided personal and criminal conduct over his relationships with his estranged wife and two girlfriends which led to termination of employment with two defense contractors and repeated convictions for criminal conduct in the 1993-1998 period. While the therapy in 1998-99 helped him to better understand the whole pattern of his behavior, Applicant has not again been involved with a woman, so the expert witness could not predict with certainty what his future personal conduct would be if he were disappointed in a romantic relationship. Except for the incident in 1980, doubt remains as to whether he is fully rehabilitated given this repeated pattern of rule violations in his personal life and given his long history of questionable conduct. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on April 18, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. <sup>(1)</sup> The SOR alleges specific concerns in personal conduct (Guideline E) and criminal conduct (Guideline J). Applicant responded to these SOR allegations in an Answer notarized on May 10, 2001, where he admitted with explanations paragraphs 1.a. through 1.d., 1.g, 1.i through 1.l., but denied 1.e., 1.f., 1. h.; he admitted paragraph 2 and subparagraph 2.a. He requested a hearing.

The case was assigned to Department Counsel who on June 6, 2001, attested it was ready to proceed. On June 8, 2001, the case was assigned to me. On June 13, 2001, Applicant's counsel entered his appearance. Subsequently, a mutually convenient date for hearing was agreed to and a Notice of Hearing was issued on June 20, 2001, which set the matter for July 10, 2001, at a location near where Applicant works and lives. At the hearing the Government introduced nine exhibits which were all admitted into evidence (Exhibits 1-9). The applicant's counsel called Applicant and two other individuals to testify. After the hearing a document was forwarded from the company which sought to clarify a fact; as

neither Applicant's counsel or the government counsel objected, that letter was admitted into evidence as Applicant's Exhibit A on July 19, 2001. The record then closed. The transcript (TR) was received on July 19, 2001.

### **FINDINGS OF FACT**

After a complete and thorough review of the evidence in the record, and upon due and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 39 years old, has been an employee of Defense Contractor #3 in State #1 since November 1997. Initially, he was granted a Secret security clearance in August 1983 when he worked for Defense Contractor #1. After he was terminated by them in 1994, he began work for Defense Contractor #2 and applied for a security clearance by completing a Security Clearance Application (Standard Form 86) (SF 86) in February 1994. Applicant was involuntarily terminated by them in November 1997. His security clearance has been downgraded from time to time, but it has never been suspended. (Answer; TR 24, 41-42, 55-56; Exhibits 1, 7, 8)

#### **Personal Conduct and Criminal Conduct**

Applicant has had a series of arrests and convictions as well as terminations from two defense contractor employers:

In 1980 Applicant pleaded guilty to Avoiding Payment of Telecommunications for long distance calls made in 1979 to a girl friend where he billed the charges to a fictitious phone number; he was fined, which was suspended, and given one year of probation conditioned upon his making restitution of \$650 in 30 days. (Answer; TR 42-43, 56-57)

In January 1993 Applicant went to visit his estranged wife at 4 AM and had intercourse with her as he did not want the divorce; he afterwards told her that the sexual act, which he said was voluntary, would delay the divorce. He subsequently was charged with Aggravated Sexual Battery, a felony offense, to which he pleaded nolo contendere; the case was continued for one year provided he had no contact with his estranged spouse and remained on good behavior. He violated the court's order and was sentenced to serve six months on the city farm, with all but one day suspended. He again violated the court's order by having contact with his estranged spouse and was required to appear and pleaded guilty to a reduced charge of Sexual Battery. He was ordered to have no contact with his estranged spouse and family for two years, to complete Anger anagement classes; his six months sentence was suspended provided he did not violate any court orders. In April 1994 Defense Contractor #2 submitted an adverse information report on the April 1994 guilty plea to Sexual Battery. He completed the anger management class as part of the agreement. (Answer; TR 24-26, 47-49, 57; Exhibits 3, 4, 9)

In August 1993 he was arrested and charged with Burglary, a felony offense when he broke a window at his estranged spouse's apartment when she refused to let him in; he served one day in jail and the charge was *nolle prossed*. (Answer; TR 26-27; Exhibit 9)

In February 1994 he threatened his estranged spouse at work and admits he struck her with some boxes when he was using a hand truck to move office equipment. Despite his self-reported good work record, this incident led to his termination from Defense Contractor #1 for violation of a rule against "threatening, intimidating or coercing another employee." (Answer; TR 27-28, 49; Exhibit 9)

After his divorce, in June 1994 he was charged with Abusive Language-Telephone for making several phone calls to a former girlfriend (Girlfriend #1) even though she was married. He had originally been involved with her from 1983 to 1987. In July 1994 he was charged with making Obscene and Harassing Phone Calls to her spouse. He filed counter charges; in September 1994 he was ordered not to have any contact with the couple and to pay court costs; all charges were dismissed. He realized it was wrong for him to attempt to coerce a relationship with her by using blackmail. (TR 29-30, 49-50, 57; Exhibit 7)

From 1995-1997 he lived with a girlfriend (Girlfriend #2) . When he became unhappy with her in September 1997 he ordered her out of his house; after she resisted by calling 911, he grabbed her inappropriately and she fell to the floor. In April 1998 he went to her apartment unannounced and again, after some conversation, "grabbed" her. (Answer; TR 35-37, 58; Exhibits 6, 7) Despite being an excellent employee, Applicant was terminated by Defense Contractor #2 in

November 1997 after he harassed his former girlfriend, who was another employee. He had been warned in September 1997 by company officials to have no contact with her either at the office or outside the office; he knowingly violated the directive several times outside of work. He had acknowledged to company officials that he knew that the former girlfriend was afraid of him. (Answer; TR 30-33, 44-45, 52-53; Exhibits 4, 6)

In April 1998 he was speeding and was arrested and charged with Driving Under the Influence of Alcohol (DUI) after he had consumed six beers and drove to his former girl friend's (Girlfriend #2) apartment; he registered .14 and .09 on the BAC and was sentenced to sixty days in jail, suspended, fined \$500, with \$250 suspended plus \$50 costs and ordered to enroll in an alcohol safety action program (ASAP), placed on probation for two years, and had his driver's license suspended for one year. He completed the ASAP program in August 1998 with good to excellent performance. In May 1998 and again in July 1998 Defense Contractor #3 submitted adverse information reports on the April 1998 DUI arrest and reported he violated a restraining order (the company later retracted the report that he had violated a restraining order), and also reported that he subsequently was convicted on all counts; he was reported to be on work release and had appealed his case. (Answer; TR 32-34, 43-44; Exhibits 2, 5, 7, A)

In April 1998 he was twice charged with Assault and Battery and Stalking this former girlfriend (Girlfriend #2); he pleaded guilty to all four counts, was sentenced to three years in jail, with two years suspended, and was able to continue his work through a work release program. After he appealed in January 1999 he was found guilty of one count of Assault and Battery and the remaining charges were dismissed. He was sentenced to 60 days in jail, suspended for one year provided he was on good behavior; he paid \$93 in court costs, and was ordered to have no direct or indirect contact with the victim; the court issued a Protective Order for one year. (Answer; TR 35-39; Exhibits 2, 5, A)

Applicant was interviewed four times by Defense Security Service (DSS) investigators: once in 1994 and three times in the 1998-99 period and was always truthful. (TR 45; Exhibits 6, 7, 8, 9) He sought counseling to help him recover from his last relationship and has not had any contact with any of these women since the April 1998 incidents. He has not had any subsequent arrests nor subsequently violated any court protective orders. He has no current girlfriend. (TR 39-41, 45-47, 54, 59)

In January 1998 Applicant consulted a licensed clinical social worker<sup>(2)</sup> (Expert #1) to deal with his distress over his break-up with his Girlfriend #2. Applicant continued to see him until January 1999; he recently saw this expert again. The expert diagnosed him with situational adjustment disorder because of the stressful situation. The therapist described Applicant's inability to empathize with the position of his partners as he was wrapped up in his own feelings; the therapy helped him understand the whole pattern of his behavior. Expert #1 could not predict whether this would recur as Applicant has not had another relationship but believes he is strong motivated to avoid this kind of situation and is doing much better. (TR 58-59, 61-71)

The vice-president of Defense Contractor #3 testified that Applicant is a supervisor who has been with the company since November 1997. Applicant's work is very good as he is a technically capable person and very conscientious. While Applicant relates professionally to everyone in the office, in June 2001 Applicant was orally reprimanded, along with another employee, over an inappropriate disagreement over how a job should be done. Generally, his performance ratings are very good to outstanding. (TR 73-77)

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

### **Guideline E - Personal Conduct**

**Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness 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 also include:**

- (1) Reliable, unfavorable information provided by associates, employers, co-workers, neighbors, and other acquaintances;
- (4) Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
- (5) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

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

None

### **Guideline J - Criminal Conduct**

**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:**

- (1) Allegations or admissions 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 include:**

- (1) The criminal behavior was not recent

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## **CONCLUSIONS**

### **Personal Conduct**

The Government advanced security concerns over personal conduct issues as Applicant's behavior<sup>(3)</sup> reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information. Despite his ability to perform well in his professional capacities, Applicant has had repeated examples where he has demonstrated poor judgment and unreliability in his personal conduct - with his estranged wife in the 1993-94 period which led to his termination from Contractor #1. He again demonstrated his poor judgment with a former girlfriend (Girlfriend #1) and her husband in the 1994 period after he was divorced. Finally, Applicant again acted irresponsibly when he repeatedly harassed and stalked Girlfriend #2 after he terminated the relationship with her in September 1997. This behavior led Contractor #2 to terminate him in November 1997 despite his otherwise excellent work performance. Even after being hired by Contractor #3 Applicant continued to show poor judgment with respect to his actions in stalking and assaulting Girlfriend #2 and made a series

of missteps in April 1998 which led to a DUI conviction and ultimately a conviction of Assault and Battery after he had successfully appealed his earlier guilty plea to four counts of battery and stalking.

While he has attended a court-ordered anger management program, his conduct nevertheless was not changed by these courses as he continued to re-offend. Despite his excellent professional performance, his calamitous personal conduct raises grave doubts as to his reliability. Notably, the court on appeal in 1999 issued another Protective Order against him for an additional year.

To rebut and overcome the Government's case, Applicant would have to demonstrate that he has mitigated<sup>(4)</sup> this past pattern. Applicant has taken one positive step to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress in that from January 1998-99, in that he sought therapy for his distress over his romantic difficulties. The expert he saw reported that Applicant's conduct reflected his inability to empathize with the position of his partners as he was wrapped up in his own feelings. While the therapy helped him to better understand the whole pattern of his behavior, Applicant has not again been involved with a woman, so the expert could not predict with certainty what Applicant's future personal conduct would be if he were disappointed in a romantic relationship. His current professional excellence has to be measured against his termination from two previous defense contractors in 1994 and again in 1997 when his personal life seriously encroached on his professional conduct at work. While not as serious, in June 2001, Applicant was orally reprimanded, along with another employee, over an inappropriate disagreement over how a job should be done. Thus, doubt remains as to whether he is fully rehabilitated given this repeated pattern of rule violations in his personal life and given his long history of questionable conduct focused in the years 1993-98. Given the seriousness and the repeated nature of his questionable conduct, he has not fully established that he would not re-engage in this conduct except for the dated incident in 1980 where he used a fictitious telephone number to avoid payment, a pattern he has not repeated. Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 1.a., but against Applicant on subparagraphs 1.b. through 1.l. under SOR Paragraph 1.

### **Criminal Conduct**

The Government maintains security concerns over criminal conduct issues because of (1) allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and (2) Applicant's multiple arrests and convictions as detailed in the Findings above and discussed under Personal Conduct.

While the 1980 arrest and conviction may be mitigated under condition (1) as the criminal behavior was not recent and as that incident was a misdemeanor, Applicant has presented insufficient evidence of successful rehabilitation for the other repeated charges and convictions as discussed above. Doubt remains as to whether he is fully rehabilitated given this repeated pattern of criminal conduct with three different women. While the charges filed by Girlfriend #1 were dismissed, he was convicted of criminal conduct against his estranged wife and Girlfriend #2. This pattern was repeated and serious, and included violations of court restraining orders which led to jail time and orders to have no contact with the two victims. Indeed the 1998 conviction, after his guilty plea to four counts of Assault and Battery and Stalking, led to a sentence of three years<sup>(5)</sup> in jail with two years suspended. He was only able to continue his work because of a work release program. After he appealed this case, in January 1999 he was found guilty of one count of Assault and Battery and the remaining charges were dismissed. The sentence was for sixty days in jail, suspended for one year provided that he be of good behavior for one year, pay court costs, and have no direct or indirect contact with the victim.

Thus, I conclude his other criminal conduct from 1993-1998 has not been mitigated<sup>(6)</sup>

as it was recent, not isolated, and there is insufficient probability that his conduct would not recur despite his commendable action in seeking therapy, as discussed above, and in completing the ASAP program in August 1998 with good to excellent performance. Further, he has not established clear evidence of rehabilitation as his criminal conduct in 1998 recurred even after completing a court ordered anger management. Notably, the court on appeal in 1999 issued another Protective Order against him for an additional year. Thus, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraph 1.a. but against Applicant on subparagraphs 1.b., 1.c., 1.e., 1.f., 1.i., 1.j., and 1.l. incorporated under SOR Paragraph 2.

## FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

### Paragraph 1. Guideline E AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

### Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against 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.

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Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. This witness who has done graduate work in his field has been licensed to practice since 1980 and was qualified as an expert witness. (TR 62-64)
3. **Conditions that could raise a security concern and may be disqualifying also include:** (1) Reliable, unfavorable information provided by associates, employers, co-workers, neighbors, and other acquaintances; (4) Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render

the person susceptible to blackmail; (5) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency

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

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.

5. The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 mandated restrictions on the granting or renewal of security clearances which was implemented within the Department of Defense by a June 7, 2001, Memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Provision (1) disqualifies persons with convictions in both State and Federal courts with sentences imposed of more than one year, regardless of time actually served. The policies apply to all pending cases in which a final decision had not been issued as of the June 7, 2001, date of the memorandum. In this instance I have determined that the Smith Amendment (10 U.S.C. Section 986) does not apply as the Applicant's 1998 sentence to more than one year was reversed on appeal in 1999 where he was sentenced to 60 days in jail, suspended.

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

1. The criminal behavior was not recent; 2. The crime was an isolated incident; 3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; 5. Acquittal; 6. There is clear evidence of successful rehabilitation.