

DATE: September 3, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-08892

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Henry Lazzaro, Esquire, Department Counsel

Erin Hogan, Esquire, Department Counsel

**FOR APPLICANT**

Randy McCrimmon

**SYNOPSIS**

Applicant's 1996 criminal indictment and his personal conduct in knowingly and willfully omitting adverse information from his security form and a federal job application raise security concerns. In completing a 2000 security form, he failed to reveal his 1996 criminal indictment for assault with a dangerous weapon and other adverse consequences. His defenses for his omissions are not credible: he has a law enforcement background and the adverse aftermath was documented. The charges were ultimately dismissed in 1999, so his criminal conduct can be mitigated. However, Applicant still had a duty to disclose and explain the issues. Thus, his personal conduct and material false statements on the government forms remain of security concern. 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 February 19, 2002. 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 Applicant. <sup>(1)</sup> The SOR alleges specific concerns over personal conduct (Guideline E) and over criminal conduct (Guideline J),. Applicant responded to these SOR allegations in an Answer notarized on March 19, 2002, where he requested a hearing.

The case was assigned to Department Counsel who on April 12, 2002, attested it was ready to proceed; and the case was assigned to another administrative judge. On April 15, 2002, the case was re-assigned to me. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing was issued on April 18, 2002, which set the matter for May 6, 2002, at a location near where Applicant works and lives. At the hearing the Government introduced seventeen exhibits which were all admitted <sup>(2)</sup> into evidence (Exhibits 1-17). The Applicant was represented by a personal assistant. (TR 7) Applicant testified, called two witnesses, and offered eight exhibits which were admitted into evidence (Exhibits A-G). The transcript (TR) was received on May 14, 2002.

## FINDINGS OF FACT

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

Applicant, 32 years old, has worked for Defense Contractor #1 in State #1 since August 1999. Previously he worked as a police officer in State #2 from 1988 when he became a cadet to March 1999 when he resigned. (Exhibit 1; TR 74-75)

Applicant attended a community college in State #3 from 1996 to 1997. In 2002 he was again attending college. (Exhibit 1; Exhibit B)

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

- According to an official police department investigation and report Applicant was involved in an altercation in October 1993 at a night club in State #2 where he had gone with his girl friend. He was in plain clothes as he was not on duty as a police officer, but he had his police gun in a holster. Another police officer, who was also off duty, but worked at the club as a bouncer, came running into the club and asked for his help. Applicant went outside the club and joined the other officer in pursuit of several men. They were trying to handcuff one of the men who was struggling when Applicant heard a shot from somewhere, so he pulled out his weapon as he did not know who was shooting at him and ducked behind a car. After the man they were trying to handcuff ran away, Applicant and the other officer went back in the club to report the incident. Applicant told the police investigator he did not remember shooting his weapon; however, a shell was found at the site from his gun. Applicant left the scene without making his weapon available for inspection as the officials who came had left with the other officer; when he was home he placed another bullet in the magazine. Several hours later the other officer paged him to let him know he needed to provide a statement. Applicant was investigated for this incident outside a nightclub and for using more force than was necessary.
- When asked in October 1993 whether he had fired his weapon that night on the scene, the police department reported he said "no" which was a false statement. Applicant claims he said he "wasn't sure" whether or not his weapon was fired as the incident happened so fast. He claimed it happened as a result of his inexperience and fear. Applicant claimed he was never shown a ballistics report, but the investigators found a shell and concluded he fired his weapon.
- In a 1995 voluntary interview he stated he did not think he had done anything wrong.
- In February 1996 a Grand Jury indicted Applicant in State #1 for "Assault with a Dangerous Weapon" and for "Tampering with Physical Evidence" for re-loading his service weapon when he had reason to believe that an official proceeding was likely to be instituted.
- Ultimately, after he was indicted in 1996, he was given a Notice of Proposed Adverse Action in 1996 to be removed from the police force; but it was held in abeyance while the criminal matter was pending.
- Also, Mr. W filed a civil action against Applicant and others, including State #2, in 1996 over the incident.
- The criminal case was dismissed in January 1999 before it went to trial. Applicant testified the civil case was also dismissed.
- A February 1999 Supplemental Investigative Report by the police department concluded Applicant violated several general orders in the March 1993 incident where two shots were fired; one grazed a Mr. W in the back of the head. A shell casing was found from Applicant's revolver. Although Applicant denied any wrongdoing, the investigation concluded that he had replaced the spent round with a live round and altered the state of his weapon.
- Applicant resigned in March 1999 before he received the police department's Notice of Proposed Adverse Action which proposed to terminate him from employment for dereliction of duty and gave him the right to appear before a panel.

(Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17; TR 65-67; TR 67-74; 85-89)

Applicant completed a security form in March 2000, but he failed to reveal any of this adverse information in response to several questions:

- In response to Question 20 about any adverse employment record Applicant answered "No": Applicant explained

he answered "no" as he chose to resign rather than pursue any of the police department proceedings which would create more stress for him and his family. He claimed and the evidence supports his claim, that he resigned before he received the March 1999 Notice of Proposed Adverse Action which proposed to terminate him from employment for dereliction of duty. (Exhibits 1-9; TR 54-56) However, Applicant had previously received the 1996 Notice of Proposed Adverse Action and should have disclosed it.

- In response to Question 21 about his police record, felony offenses, Applicant answered "No" as he felt the case was "not the norm" as he risked his life in aid a fellow officer in the 1993 incident. He believed he had been cleared of all the charges when the case was dismissed. (Exhibits 1, 7; TR 56-58) However, he should have disclosed the indictment.
- In response to Question 22, his police record, firearms/explosives offenses, Applicant answered "No" as he did not believe the weapons charge was justified and the firearms incident was isolated. (Exhibits 1, 7; TR 58-60) However, he should have disclosed the indictment.
- In response to Question 26 about his police record, other offenses, Applicant answered "No" as he was indicted, but believed he was not arrested or charged and he thought this offense should not be included as he was not convicted. (Exhibits 1, 7; TR 60)
- In response to Question 40 about any public record of civil court actions, Applicant answered "No" as it was his impression that the "civil stuff action would be dismissed." He believed the case was over in 1996 but the actual dismissal was not until 1999. The incident happened in 1993. The civil part of the case was handled by his lawyer and the police department. (Exhibits 1, 7; TR 61; 84-85) However, he should have disclosed the civil case.
- Applicant also responded "No" to Question 41, "Are you now under charges for any violation of law?" in a December 1997 Application for Federal Employment, SF 171, for a police officer job. Even though the case has not formally dismissed, he answered "no" as he knew from his lawyer that the case was going to be dismissed. He thought he was "doing the right thing." He was hoping to move on and pick up the pieces of his life. (Exhibits 15; TR 62-63) Applicant's defense that the case was "basically over" in 1996 but was not dismissed by the court until 1999, so that in his "mind frame" the case was over, is not a credible defense as he had several more court appearances and the trial was still pending at the time he completed the SF 171. He had been in court just ten days before he completed this application. (Exhibit 11; TR 82-84) Applicant submitted a letter to O.P.M. to correct the record and clarify his court statu in April 2000. (Exhibit H; TR 40)

On cross-examination Applicant admitted that he knew an indictment was "an assembly of accusations against a person." His claim that he did not know it was a formal charge is not credible given his law enforcement background; further, he remembered that he had to go to court a number of times on the indictment over a three year period; and he knew the severity of the criminal and civil cases. He also knew he had been charged with an assault with a firearm. (Exhibit 11; TR 75-82) Consequently, I conclude that Applicant knowingly and willfully falsified material facts by his "No" answers on the security clearance form and on his SF 171.

### **References**

Applicant's mother testified that he is trustworthy and dependable. He is trying to improve himself by going to night school. (TR 42-47)

Applicant's fiancé also testified on his behalf. She has known him for seven years and finds him honest and trustworthy and a good father to his children. Once the case was dismissed in 1999 he thought that chapter of his life was closed. (TR 47-52)

Applicant submitted several favorable references from a priest, a professor, his supervisor in his current job, a co-worker in a shop where he also works, and a general character reference. (Exhibits A-E; TR 36-38) A co-worker who knows him in his current job also provided a favorable reference. (Exhibit G; TR 38-39)

His supervisor in the police department in State #1 where Applicant was employed from 1998 to 1999 stated that Applicant resigned in good standing; for the two years that he was under this supervisor, Applicant sustained an above average rating. (Exhibit F)

### **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, I weighed relevant Adjudication Guidelines as set forth below :

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

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

**The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:**

[First] Refusal to undergo or cooperate with required security processing, including medical and psychological testing; or

[Second] Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

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

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, or award fiduciary responsibilities;

**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:**

- a. Allegations or admissions of criminal conduct
- b. A single serious crime or multiple lesser offenses.

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

- a. The criminal behavior was not recent
- d. . . .the factors leading to the violation are not likely to recur;
- f. There is clear evidence of successful rehabilitation

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. 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: Applicant had several opportunities on the February 2000 security form to disclose his past adverse criminal and employment issues, but he failed to do so in answering questions 20, 21, 22, 26. Neither did he disclose the past civil action brought against him in answering question 40. Further in 1997, while the criminal charges were still pending, Applicant answer "No" to a question on a federal employment application that asked whether he was "now under charges for any violation of law." 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.

While he established that he resigned before he received the March 1999 Notice of Proposed Adverse Action which proposed to terminate him from employment for dereliction of duty, he had previously received the 1996 Notice of Proposed Adverse Action and should have disclosed it and the 1996 indictment. To rebut and overcome the Government's case, Applicant would have to demonstrate that he has mitigated<sup>(4)</sup> this conduct.

His current good work record and favorable reference letters have to be measured against his knowing and willful failure to disclose required information on two government forms. He offered discrepant defenses for his omissions: first he knew he had been indicated and he knew an indictment was "an assembly of accusations against a person." But he claimed he did not know it was a formal charge. However, he remembered that he had to go to court a number of times on the indictment over a three year period; and he knew the severity of the case. He also knew he had been charged with an assault with a firearm. As a former experienced law enforcement officer, his defense lacks credibility. His view that the matter was essentially over in 1996 is not supported by the court documents where the matter was not dismissed until 1999.

Also, his explanation that he had hired a lawyer to handle the charges does not justify his decision to omit this adverse information from government forms. He had a duty to inform himself and to fully disclose these issues. While he might want to put these issues behind him after the January 1999 dismissal of his case and by his 1999 resignation from the police force, these defenses do not justify his failure to disclose the totality of his past criminal and employment problems on his security form. He was put on notice by the 1996 Notice of Proposed Adverse Action that the 1993 incident and 1996 indictment could adversely affect his employment. The fact that he resigned before he received the 1999 Notice of Proposed Adverse Action, does not erase the past notice of employment problems.

While he continued to claim his innocence in the 1993 incident, neither the police department nor the grand jury found his claim credible. He was found to have discharged his police weapon which grazed an individual and to have tampered with his gun after it was fired as he re-loaded his service weapon when he had reason to believe that an official proceeding was likely to be instituted. He was formally indicted for "Assault with a Dangerous Weapon" and for "Tampering with Physical Evidence" His employment was put in jeopardy by these charges and a civil suit was filed. Consequently, I conclude that Applicant falsified material facts by his repeated "No" answers on the security clearance form and on his SF 171 to questions that were both relevant and material to his security eligibility. Applicant's assertion and personal belief he engaged in no wrong-doing is not supported by the voluminous records which document the subsequent adverse actions of the grand jury and the police department.

Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 1.a. through 1.f. under SOR Paragraph 1.

### **Criminal Conduct**

The Government maintains security concerns over Applicant's criminal conduct in 1993 where he was indicted in

February 1996 for assault with a deadly weapon and tampering with physical evidence by a Grand Jury in State #1. However, the case was dismissed in January 1999.

To his credit, there is no evidence that Applicant was removed from his police duties while these charges were pending. He continued to work as a police officer; and according to his supervisor, Applicant did an above average job; he resigned in 1999 in good standing. Consequently, I conclude this criminal conduct can be mitigated as this 1993 incident was isolated. There is no evidence that he has subsequently been implicated in any other criminal activity since 1993 when the incident happened. Moreover, Applicant has a successful work record and favorable references. Consequently, the actions that led to his 1996 indictment may now be mitigated under condition (a) as the behavior was not recent, (d) . . . the factors leading to the violation are not likely to recur; and (f) there is clear evidence of successful rehabilitation from his several favorable references.

On the other hand, his conduct in willfully falsifying two federal forms by his failure to disclose the details of the 1993 incident and subsequent 1996 indictment raises a security concern under Title 18 United States Code Section 1001 <sup>(5)</sup>

. Although he was never prosecuted under this statute or convicted, his conduct, as discussed above under personal conduct, falls within that statute as his "No" answers were given "knowingly and willfully." As a police officer, he had a deeper understanding of criminal law and should have disclosed his indictment and the other negative consequences of his 1993 incident on the government forms. If he believed the dismissal of the criminal and civil cases ultimately confirmed his innocence, then he could have included that mitigating information along with the required disclosures. His failure to make these disclosures raises questions about his security worthiness.

Thus, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 2.a., but against Applicant on subparagraph 2.b., 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.: Against 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

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: 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.

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. Applicant objected to Exhibits 2, 3, 5, 6, 7, 10, 13, 15, and 17; however, I over-ruled his objects and admitted them into evidence. (TR 12-34)
3. **Conditions that could raise a security concern and may be disqualifying also include:** 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, or award fiduciary responsibilities;
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. Title 18 United States Code Section 1001. - Statements or entries generally**

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.