

DATE: September 3, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-19513

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Catherine Engstrom, Esq., Department Counsel

Erin C. Hogan, Esq., Department Counsel

**FOR APPLICANT**

George N. Elfter, Esq.

**SYNOPSIS**

Applicant was arrested in 1985 and in 1991 for driving while intoxicated. He failed to report the 1991 arrest on his Personnel Security Questionnaire completed in 1993. He failed to list both arrests on the Security Clearance Application he completed in November 2000, although he acknowledged both arrests in a signed, sworn statement made to a special agent of the Defense Security Service in May 2001. Applicant submits no credible evidence to mitigate his falsification. Clearance is denied.

**STATEMENT OF THE CASE**

On February 19, 2003, 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, with modifications, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In the SOR the Government alleged that Applicant was disqualified from obtaining a security clearance because of personal conduct (Guideline E). In a sworn statement dated March 3, 2003, Applicant responded to the SOR and requested a hearing. The case was initially assigned to Judge Roger Willmeth, but due to caseload considerations, was subsequently assigned to me on March 31, 2003. A Notice of Hearing was issued on April 4, 2003, setting a hearing date of April 28, 2003. By facsimile communication dated April 24, 2003, Applicant advised that he had hired legal counsel and requested a continuance of 45 days. By Order dated April 25, 2003, I granted Applicant a continuance of 30 days. I held a hearing in this matter on May 27, 2003. During the course of the hearing, the Government presented 7 exhibits and one witness, and Applicant presented 6 exhibits and two witnesses. Applicant's Exhibit E consisted of two

testimonial letters on behalf of Applicant. Applicant's Exhibit A was the same as Government's Exhibit 7, and Applicant's Exhibit C was the same as Government's Exhibit 2. The transcript (Tr. ) was received June 4, 2003.

## FINDINGS OF FACT

In his answer to the SOR, Applicant denied all of the factual allegations involving Guideline E, Personal Conduct. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following findings of fact:

Applicant is 39 years old. He served in the U.S. Army for 12 years, receiving an honorable discharge in 1996. From 1988 until 1996, while on active duty, Applicant was assigned to counterintelligence and carried out personnel security investigations and investigated security violations. (Tr. 43; 83-84) In 1988 and in 1993, during the time of his military service, Applicant held security clearances. Because of his work in security investigations, Applicant was familiar with security clearance application and interview formats and procedures. (Tr. 84) From 1996 to 1998, after leaving military service, Applicant was a full-time student, and since 1998 he has been employed by defense contractors as an account manager and as a general mechanic. (Security Clearance Application, SF-86, dated November 8, 2000)

In a signed, sworn statement dated May 2, 2001, Applicant acknowledged that he was arrested in 1984<sup>(1)</sup> and in 1991 for driving under the influence of alcohol. He further stated that the 1985 charge was dismissed and he paid a fine for a lesser charge.<sup>(2)</sup> Applicant pled guilty to the 1991 charge and paid \$1,000 in fines and costs. Both arrests occurred while Applicant was on active military duty. After the first arrest, Applicant received a written reprimand from his company commander. The reprimand was placed in Applicant's military dossier. (Tr. 47.)

Applicant completed a Security Clearance Application (SF-86) on November 8, 2000. He answered "No" to Question 24 on the Security Clearance Application. Question 24 reads as follows: "Your Police Record - Alcohol/Drug Offenses [:] Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 128 U.S.C. 3607."

On January 8, 1993, two years after his second arrest for driving under the influence, Applicant signed and certified a Department of Defense Personnel Security Questionnaire (DD Form 398) after answering "Yes" to Questions 21a and 22d. Question 21a reads as follows: "Have you ever been arrested, charged, cited, held, or detained by Federal, State, or other law enforcement or juvenile authorities regardless of whether the charge was dropped or dismissed or you were found not guilty?" Question 22d reads as follows: "Has your use of alcoholic beverages (such as liquor, beer, wine) ever resulted in the loss of a job, disciplinary action, arrest by police, or any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism)?" Section b of Question 21 requires that "Yes" answers be explained by providing specific details of the offense or violation, the name and location of the law enforcement agency which charged the individual with the crime or offense, the name and location of the court or magistrate and the penalty imposed or the disposition of the matter. Applicant completed section b by listing only details of the 1985 arrest for driving under the influence.<sup>(3)</sup> He provided no information in section b identifying the 1991 arrest and its disposition.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information*, §3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. *See* Directive, Enclosure 2.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore properly concerned where available information indicates that an applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An evaluation of whether the applicant meets the security guidelines includes consideration of a number of variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge must consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; (9) the likelihood for continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Adjudicative Guideline E, Personal Conduct (Attachment 5 to Enclosure 2) is pertinent to this case. The security issues identified under Guideline E which apply to the facts of this case are:

E2.A5.1.1. The Concern: 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 condition that could raise security concerns and may be disqualifying is

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, or award fiduciary responsibilities.

In this case, the following conditions could mitigate security concerns :

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

E2.A5.1.3.2: The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

### **Burden of Proof**

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless clearly consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. In *Egan*, 484 U.S. at 531, the Supreme Court concludes that "[t]he clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."

Accordingly, doubts against an applicant's security worthiness are to be resolved against the applicant.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described above, I conclude the following with respect to each allegation set forth in the SOR:

Subparagraph 1.a. of the SOR alleges, under Guideline E, Personal Conduct, that Applicant falsified material facts on the SF-86 he executed on November 8, 2000, when he answered "No" to

Question 24 and failed to report that he had been charged with or convicted of two offenses related to alcohol or drugs, one in 1985 and the other in 1991. The relevant security concern is E2.A5.1.2.2.

In his Answer to the SOR, Applicant denies the falsification allegation of subparagraph 1.a. of the SOR and asserts that he had no intention to deceive the Government by omitting material information from the SF-86 he executed on November 8, 2000. Applicant states he does not have a copy of the SF-86 he executed on November 8, 2000, but he asserts that the SOR is ambiguous in its references to Questions 23 and 24 of the SF-86. He states that Question 23 of the SF-86 reads "Your Police Record." He states that Question 23 d of the SF-86 reads: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant asserts that his answer to Question 23d "should have been, and to [his] recollection was, Yes." He attributes his "No" response to that question on his SF-86 to clerical error. Applicant further states that Question 24 of the SF-86 reads "Your Use of Illegal Drugs and Drug Activity." Applicant asserts that Question 24 seeks information on an applicant's illegal drug activity, and he asserts that his answer to Questions 24a, 24b, 24c "should have been, and to the best of [his] recollection was, No."

The Government's Exhibit 1 is the Standard Form 86 Security Clearance Application executed electronically by Applicant on November 8, 2000. On that document, Question 23 reads as follows:

### 23. Your Police Record - Pending Charges

Are there currently any charges pending against you for any criminal offense?

For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this

Requirement is for certain convictions under the Federal Controlled Substances Act

For which the court issued an expungement order under the authority of 21 U.S.C.

844 or 18 U.S.C. 3607.

There are no sub-questions designated by numbers or letters for Question 23. On his SF-86, Applicant answered "No" to Question 23.

Question 24 on the SF-86 executed by Applicant on November 8, 2000 reads as follows;

### 24. Your Police Record - Alcohol/Drug Offenses

Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?

For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

There are no sub-questions designated by numbers or letters for Question 24. On his SF-86, Applicant answered "No" to

Question 24. Applicant's explanation appears to be based on a question pattern not found in the SF-86 but perhaps found in another security clearance questionnaire form.

Applicant called as a witness the Defense Security Service special agent who interviewed him on May 2, 2001, and to whom, on that day, he gave his signed, sworn statement. The special agent testified that Applicant told him he thought he had listed the two alcohol-related arrests on his SF-86 and the absence of those arrests on his SF-86 was due to clerical error. (Tr. 136-138.) The special agent stated that Applicant told him he would provide a copy of his SF-86 with the correct information he had submitted, if he could find it. The special agent stated that he did not receive from Applicant documentation showing that Applicant had listed the alcohol-related arrests on his SF-86 and that a subsequent omission could be attributed to clerical error. (Tr. 139-140.) Applicant supplied no persuasive evidence of irregularity or clerical error to explain why he responded "No" to Question 24 or why he did not list the two alcohol-related arrests on the SF-86 he executed on November 8, 2000. He was unable to rebut the Government's evidence showing that his answer to Question 24 was false and contrary to fact. He did not provide persuasive evidence to rebut the inference that the omissions were deliberate.

As a former personnel security investigator, Applicant was fully aware of the Government's concern, under Guideline E, when it discovers a falsification of a security clearance application Applicant himself states that falsification "goes to a person's basic integrity, and . . . the way they conduct themselves. If they are not going to disclose something about themselves, then they would not have a conscience in disclosing classified information they might have access to, so it breaches an integrity issue." (Tr. 84)

Mitigating condition E2.A5.1.3.1 does not apply to the instant case. The information that Applicant omitted from his SF-86 was pertinent to a determination of his judgment, trustworthiness, or reliability. Moreover, the falsification was recent, and the record shows that Applicant did not correct the falsification until he was interviewed by a Defense Security Service special agent six months after submitting the false information on his Security Clearance Application. Thus, mitigating factor E2.A5.1.3.2 does not apply. I find against Applicant as to SOR subparagraph 1.a.

Subparagraph 1.b. of the SOR also alleges disqualifying conduct under subparagraph E2.A5.1.2.2 of Guideline E, Personal Conduct, and states that, on January 8, 1993, Applicant falsified material facts on a Questionnaire for National Security Positions, Standard Form DD398 (SF-DD398). Question 21a on the SF-DD398 reads as follows: "Have you ever been arrested, charged, cited, held, or detained by Federal, State, or other law enforcement or juvenile authorities regardless of whether the charge was dropped or dismissed or you were found not guilty?" Directions for responding to Question 21 read as follows: "You must list ALL arrest information regardless of whether you have previously listed or disclosed this information or whether the record in your case has been "sealed," expunged, or otherwise stricken from the court record. You must also include all courts-martial or non-judicial punishment (Article 15 UCMJ or Captain's Mast). The only exceptions are for certain convictions under the Federal Controlled Substance Act 21 U.S.C. 844 or 18 U.S.C. 3607 (See DETAILED INSTRUCTIONS) You may exclude minor traffic violations for which a fine or forfeiture of \$100 or less was imposed, unless alcohol or drug related."

The SOR alleges that while Applicant listed his 1985 alcohol-related arrest in response to Question 21 on the SF-DD398, he deliberately failed to disclose that he was arrested in 1991 for driving while intoxicated. Applicant denies that he failed to disclose the 1991 arrest on the SF-DD398 he signed on January 8, 1993. He states that he was required to submit a written draft of his responses to the SF-DD398, which was then typed by a clerk and prepared for his signature. He avers that the clerk erred and neglected to include the 1991 alcohol-related arrest on the typed final version of the SF-DD398, which he reviewed and signed.

Applicant states that his 1991 arrest had been reported to his commanding officer and he had received a letter of reprimand for the conduct. (Tr. 56) He also states that he fully discussed the 1985 and 1991 charges during his subject interview. He acknowledges that he failed to take care in reviewing his SF-DD398 before signing it and certifying, under penalties imposed by 18 U.S.C. §1001, that the statements made by him on the form were made in good faith and were "true, complete, and accurate to the best of his knowledge and belief."

Applicant's Exhibit A and Government's Exhibit 7 is a two-page Report of Investigation (ROI) dated October 25, 1993, made by a Defense Investigative Service special agent. The ROI states that Applicant was questioned about his 1985

driving under the influence arrest. The ROI also recounts that Applicant stated that, with the exception of the 1985 incident, "his use of alcoholic beverages has never resulted in the loss of a job, disciplinary action, arrest by police or an alcohol related treatment or counseling." (ROI, at 1-2) The ROI states that Applicant "stated that he in fact no longer drinks alcoholic beverages and has no future intentions of drinking alcoholic beverages." (ROI, at 2.) The Government called as a witness the special agent who conducted the subject interview of Applicant in 1993 and wrote the two-page ROI. The special agent testified credibly regarding his interview of Applicant and the report he wrote subsequent to the interview. (Tr.18-21) I did not find credible Applicant's attempts to discredit the special agent's interview of the Applicant and his subsequent report. (Tr. 22-39). Mitigating condition E2.A5.1.3.1 does not apply to this allegation because the information that Applicant omitted from his SF-DD398 was substantiated in the record and was pertinent to a determination of his judgment, trustworthiness, and reliability. When viewed with the allegations of subparagraph 1.a. of the SOR, it becomes clear that, while the 1993 falsification was not recent, it was not an isolated incident. Applicant provided no timely voluntary information to correct the misinformation in his 1993 SF-DD398 and subsequent interview, and therefore mitigating factor E2.A5.1.3.2 does not apply. Accordingly, I find against Applicant as to SOR subparagraph 1.b.

The Government has satisfied its initial burden of proof under Guideline E (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed in question when the applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of evidence and under all of the Directive guidelines that were generally applicable or might be applicable under the facts of the case. Under the whole person concept, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

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

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: 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.

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Joan Caton Anthony

Administrative Judge

1. Applicant stated at his hearing that the first arrest occurred not in 1984 but in 1985. (Tr. 46; 85.)

2. A report prepared by the Defense Investigative Service on October 25, 1993, identifies the time of the first arrest for driving under the influence as December 1985. The report states that Applicant was arrested and charged with driving under the influence and running a red light. The report states that Applicant was acquitted of the driving under the influence charge but was found guilty of reckless driving. Applicant acknowledged that he received a sentence of 30

days in jail, which was suspended, and his driver's license was suspended for 6 months. (Tr. 86-90.)

3. Applicant stated that the disposition of the 1985 arrest was "not guilty." He provided no information regarding the suspended sentence imposed for the lesser charge, nor did he explain that his driver's license had been suspended for 6 months.