

DATE: April 11, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-20792

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant, a retired 53-year-old military officer, accepted employment (after retirement) with a DoD contractor with whom he had had considerable contact while exercising oversight responsibilities on a government contract from 1993 to 1995. Although his retirement employment did not require him to work on this contract for the DoD contractor, he voluntarily made two telephone calls to the military comptroller (in October 1996) of the military installation where the contract was being performed to check on the status of an overdue lease payment arising out of the contract. He was charged with and pleaded guilty to violating federal conflict of interest statutes. The incident was an isolated event that occurred more than five years ago after Applicant had completed 26 years of distinguished military service. The security concern raised by his brief lapse in judgment has been mitigated by the above circumstances and by the rehabilitation demonstrated in his acceptance of full responsibility for his actions. Clearance is granted.

### **STATEMENT OF THE CASE**

On October 18, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865m, "*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 a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied, or continued.

Applicant answered the SOR on November 5, 2001 and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on January 14, 2002. On February 19, 2002, 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 12 exhibits. Applicant relied on his own testimony, the testimony of three other witnesses and four exhibits. He submitted one additional exhibit (admitted without Department Counsel objection) in the time allotted after the hearing was adjourned. A transcript of the proceeding was received on February 2002.

## FINDINGS OF FACT

The Statement of Reasons (SOR) alleges Applicant was charged with, and pleaded guilty to a misdemeanor violation of 18 U.S.C. § 207(a)(1) (under Guideline J), because he demonstrated questionable judgment when he knowingly communicated with a military official about a project he had worked on (while on active duty) after he retired and accepted employment with the DoD contractor who was responsible for the project. (Under Guideline E). In his answer to the SOR, Applicant admitted, with explanation, all allegations set forth in the SOR. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Applicant is 53 years old and has been an employee of a DoD contractor (in State C) since October 2000. Previously, he had served in the United States military from June 1970 to July 1996, retiring in the grade of O-6. He was employed by the DoD contractor whose subsidiary had contracted with the U.S. Government (see above) from August 1996 to February 1999. The security clearance he held while in the military expired when he retired from military service in July 1996.

From July 1993 to July 1995, Applicant served as the "Vice Commander" of a military organization on Military Installation X; Installation X is located in an isolated area of State A, a State notorious for its harsh winter environment. In his capacity as Vice Commander, Applicant had day-to-day oversight responsibilities for an 801 housing project (Tr. 67-68)--a seventy million dollar construction contract. At the time this construction project was begun, on-base military housing for service personnel was very inadequate, and there was no housing available for military personnel in the local community (Tr. 66, 70-71). The principle civilian contractor for the construction project was a subsidiary of Corporation A. Because of the demanding requirements of the harsh environment, there were numerous problems with the construction project. These problems typically concerned conflicts between the contractor and the military quality assurance personnel. Compounding the quality control problem was a requirement to have housing units completed by January 1995 (Tr. 73).

Applicant became strongly identified with the success and completion of the construction project because of the importance of providing adequate housing for military personnel in the demanding environment, and because of his commanding officer's pressure to keep the project moving (Tr. 73-74).

Applicant was reassigned from State A to State B in July 1995. He received a Legion of Merit service award for the service rendered during his tenure at Installation A. The citation for this award including this reference to Applicant's work in the 801 project:

As Vice Commander...he established an unparalleled record of quality of life improvement initiatives that have become the standard for the entire Department of Defense. He took a seriously crippled 366 unit private sector housing development and made it into the "model" for future military family housing, which was briefed to the Secretary of Defense. He was instrumental in securing a new contractor, long-term financing, and building an unprecedented spirit of cooperation and partnership between the (military department) and the project builders to achieve fantastic results. He brought all the players together and built a team to manage the project, engineering, contracting, environmental, public affairs and legal. The success of this development has had the single most positive affect on the quality of life at this far northern base.

Applicant retired from military service (in State B) in late July 1996 and immediately accepted employment with Corporation A and moved back to State A in August 1996. Applicant was hired as the General Manager, Government Services Division.

As an employee of Corporation A, Applicant did not have responsibility for 801 military housing or for the construction project at Military Installation X. However, in October 1996 while talking with Mr. Z, a fellow Corporation A employee, Mr. Z informed Applicant a payment was overdue on the Installation X housing project--for which Applicant had been responsible during the 1993-1995 time frame. In September 1996, the U.S. Government and a subsidiary of Corporation A had entered a twenty year lease for the military housing units (the 801 housing project) on Installation X. The lease called for the U.S. Government to make an initial payment of 8.6 million dollars on or about October 15,

1996. Mr. Z indicated he did not know whom to call to facilitate payment. Applicant called LTC M (the comptroller of Installation X) on October 17, 1996 for the ostensible purpose of ascertaining the status of the payment that was due on October 15 (Tr. 79-80). He called LTC M again the following day and was informed (by LTC M) there was a "big warranty problem" (Tr. 80).

In May 1997, Applicant had a conversation with Col H, his successor in command at Installation X. During this conversation, he expressed displeasure at a memo that had been sent to Corporation A's bonding company.

Applicant's two brief telephone conversations with LTC M<sup>(1)</sup>, and the conversation with Col H, resulted in his being charged with two counts of violating Title 18, United States Code, §§ 207 (a)(1), and 216 (a)(1) (Conflict of Interest) in December 1997. In February 1998, he pled guilty to count 1 (a violation of § 207(a)(1)) and count 2 was dismissed<sup>(2)</sup>. Count 1 alleged in part Applicant had:

knowingly, and with the intent to influence, communicate with an officer and employee of the United States...in a matter connected with or arising out of ...the 801 Housing Project, a particular matter involving specific parties (Corporation A) in which the United States had a direct and substantial interest, and in which (Applicant had participated personally and substantially as such officer and employee, to wit: (Applicant) did converse with (LTC M) on behalf of Corporation A to determine the status of the late lease payment in an attempt to expedite the late payment on the 801 Housing Project.

For his misdemeanor misconduct, Applicant was fined a total of \$5,025.00. In subsequent administrative proceedings, he was barred from contracting with the United States Government for one year effective February 20, 1998.

While Applicant admits violating the conflict of interest statute by calling LTC M and inquiring about the overdue payment on the 801 housing project, he insists the purpose of his call was not to "influence" the U.S. Government to make payment (Tr. 79), but to check on the status of the overdue payment. The contract under which the services had been provided included the terms of payment (Tr. 79). Applicant explained: if the military service did not make payments as required, it would be obligated to pay interest for any late payment (Tr. 97-98). Moreover, Applicant knew LTC M did not have authority to make payment without the approval of the contracting officer. In hindsight, Applicant admits he made the telephone calls without considering how his action would look from the government perspective (Tr. 82).

In February 1999, Applicant left the employment of Corporation A under favorable terms and moved with his family to State C where they currently reside. As stated above, Applicant began working for his current employer--a different DoD contractor--in October 2000.

Except for the conflict of interest charges arising from two telephone calls in October 1996 and one telephone call in May 1997, Applicant has an unblemished record. His service record during a demanding 26 year career is above reproach. He consistently received the highest possible evaluations on his *Officer Performance Reports*. Two general officers, who are still on active duty, have submitted letters on Applicant's behalf. Both indicate their close relationship with Applicant during the time he served as their subordinate and both strongly recommend the restoration of his security clearance. One officer states Applicant's integrity and trustworthiness were unquestioned; Applicant was his most trusted advisor during the time he served as his Vice Commander in State A. The other officer states he has never known an officer with greater integrity, honesty or dedication in his 36 years of military service. Similar accolades have been offered by Applicant's supervisor and co-workers in his current employment. The three witnesses who testified at his administrative hearing indicated an awareness of the conflict of interest charge to which Applicant pled guilty (Tr. 18-19, 41-42, 50-51). This incident did not change their assessment of Applicant's honesty and integrity, nor did it diminish their strong belief concerning Applicant's suitability to access classified information.

## 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 that 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 Section 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.A10.1.3.6. There is clear evidence of successful rehabilitation.

### **PERSONAL CONDUCT**

#### **(Guideline E)**

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.

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

E2.A5.1.2.5. 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 Applicable [\(3\)](#)

### **Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government established its case, the burden of 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. When the facts proven by the Government raise doubt about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of 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, 531 (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 appropriate precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guidelines J and 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 Section E2.2 dealing with adjudicative process, both in the Directive.

A security concern is raised by Applicant's conviction of a misdemeanor violation of Title 18, United States Code, § 207(a)(1). A history of pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Mitigating Applicant's involvement in the above criminal conduct--to which he pleaded guilty and was sentenced in February 1998--is its occurrence more than five years ago, and the fact the incident was an isolated event in Applicant's life. Prior to this incident, Applicant had served with distinction in the U.S. military for more than 26 years. He had not been involved in any misconduct during his 26 years of military service, and he has not been involved in any misconduct, other than the above incident (occurring in October 1996), in the five years since its occurrence. In every sense of the word, Applicant's telephone calls to military personnel in October 1996 and May 1997 were isolated events.

Also mitigating Applicant's lapse of judgment in 1996 and 1997 is evidence of successful rehabilitation. When he realized his conduct violated conflict of interest statutes, Applicant did not attempt to deny what he had done, nor did he attempt to avoid the consequences. He cooperated in the investigation and has been consistently honest and forthright in accepting full responsibility for his actions. In accepting full responsibility, he has demonstrated considerable insight into the thought process which motivated him to remain involved in a matter for which he was no longer responsible.

Finally, consideration has been given to the circumstances surrounding Applicant's conflict of interest violation. He made the improper telephone call because of the energy, intellect and ego he had invested in moving the housing project toward successful completion while he was on active duty. Because of his deep involvement, he remained attached to the project and committed to its success long after his professional responsibility (for the 801 project) had been taken over by his successor. He unwittingly and unintentionally violated the conflict of interest statutes because he did not want the success of the project derailed because a misunderstanding or clerical error had prevented the first lease payment from being made on time. Guideline J is concluded for Applicant.

A security concern is raised by Applicant's unwillingness to comply with rules and regulations. His unwillingness to comply with rules and regulations could indicate he may not properly safeguard classified information.

While Applicant clearly violated the conflict of interest statute when he called LTC M and inquired about the status of the lease payment, his behavior on this isolated occasion is not the sole basis, nor is this event the only evidence by which to judge his ability to comply with rules and regulations. His 26 years of unblemished military service in a demanding career field provide ample evidence of his ability to comply with rules and regulations over an extended period of time under many different conditions and circumstances. As noted above, the lapse of judgment which caused him to violate the conflict of interest statute was truly an isolated event. In his 26 years of military service and in the 18 months he has been in his current position, there is not a hint of a similar lapse. 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

Paragraph 1.a For the Applicant

Paragraph 2 (Guideline E) FOR THE APPLICANT

Paragraph 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 restore Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. Applicant estimates he spoke with LTC M for less than two minutes on both occasions (Govt Exh. 12).
2. Count 1 arose from Applicant's telephone calls to LTC M; count 2 arose from his conversation with Col. H.
3. None of the seven Guideline E mitigating conditions specifically listed in the Directive are applicable to mitigate misconduct which includes: a pattern of dishonesty or rule violations.