

DATE: September 17, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-22111

## **DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

William S. Fields, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro se*

### **SYNOPSIS**

Although Applicant's assault charge in 1991 and marijuana possession charge in 1997 are extenuated and mitigated by the passage of time, the suspended license admissions are aggravated by Applicant's intentional alteration of the automobile tags in April 2001, thereby trying to deceive law enforcement. Applicant's personal conduct occurred when he intentionally concealed material information from his EPSQ in April 1999. Even though the intentional omission occurred over three years ago, Applicant did not disclose the adverse information about his drug-related arrest in the military, and the financial judgments, until his sworn statement in June 2000, more than a year after the original omission. Applicant's deceptive behavior in 1999 and 2001 disqualifies him from security clearance approval under the personal and criminal conduct guidelines. Clearance is denied.

### **STATEMENT OF CASE**

On May 31, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. Applicant filed his Answer to the SOR on June 27, 2002, and elected to have his case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on July 10, 2002. Applicant received the FORM on July 16, 2002. His response was due 30 days later or by August 15, 2002. No response was received. The case was received by the undersigned for decision on August 26, 2002.

### **FINDINGS OF FACT**

The SOR alleges criminal conduct and personal conduct (intentional falsification). Applicant' admitted all allegations of the SOR. His admissions shall be incorporated into the following factual findings.

Applicant is 36 years old and employed as an assembler for a defense contractor. He seeks a secret clearance.

On July 6, 1991 (subparagraph 1.d.), Applicant was charged with battery on a police officer, resisting, interference, and/or obstruction of a police office, trespassing by entering and remaining, disturbing the peace by intoxication, and, simple criminal damage to property. At the time of the criminal charge, Applicant was on leave from active duty in the United States Navy (USN). On June 6, 1991, Applicant and his older brother decided to drink at an unfamiliar bar, not in his neighborhood. His brother started arguing with another patron. A short time later, his brother began fighting with the patron. The fight escalated quickly with 10 or 12 individuals eventually taking part before the fight was stopped by police. Two off-duty police officers, employed as security for the bar, tried unsuccessfully to separate the combatants. One officer tried to pull Applicant off another participant, and was punched. Applicant recalled posting bond and returning to court to pay a fine. During the fight, one of the police officer's shirt was ripped, and Applicant believes the cost of repair or replacement of the shirt was added to the court fine.

On approximately April 18, 1997 (subparagraph 1.c.), Applicant was visiting his younger brother and they decided to attend a party where marijuana was being used. Appellant and his brother were smoking marijuana at the front door of the party. The police were dispatched in response to a loud noise complaint. Upon their arrival, the police immediately noticed then arrested Applicant and his brother for smoking marijuana. Applicant recalled paying a \$300.00 fine for possession of marijuana and drug paraphernalia.

On March 29, 2001 (1.b.), Applicant admitted driving on a suspended license. On April 7, 2001 (1.a.), Applicant admitted driving on altered tags and a suspended license. Applicant provided no explanation for the two traffic offenses.

On April 19, 1999, Applicant falsified a Security Clearance Application (EPSQ, Version 2.1) in seven locations. He provided false information because he did not want to jeopardize his chances of obtaining a security clearance and employment. His "no" answer to question 17 (subparagraph 2.a.), requiring information about Applicant's military record and whether he had ever received an other than honorable discharge from the military, was false.

Applicant also falsified his answers to six additional questions on the same EPSQ. Applicant falsely answered "no" to question 24 (2.b.), asking whether he had ever been charged or convicted of an offense related to drugs. Applicant falsely answered "no" to question 25 (2.c.), seeking information about whether Applicant had been subject to court-martial or other disciplinary proceeding under the Uniform Code of Military Justice. In addition, Applicant also falsely answered "no" to question 27 (2.d.), asking whether Applicant had ever used drugs since the age of 16 or in the last seven years, whichever was shorter.

Applicant falsely answered "no" to question 35 (2.e.), requiring information about repossessions in the past 7 years. In response to question 38 (2.f.), requiring information about debts in the last seven years 180 days or older, Applicant falsely answered "no." Finally, Applicant falsely answered "no" to question 40 (2.g.), requiring information about whether Applicant had been a party to any public record court action in the last 7 years, and not mentioned in any other location on the EPSQ. The missing financial information includes a medical debt originating in 1992, and a judgment filed by a local hospital in 1996.

## **POLICIES**

Enclosure 2 of the Directive sets forth policy conditions which must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent criterion; however, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

### **Guideline J (Criminal Conduct)**

Disqualifying Conditions (DC):

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

Mitigating Conditions (MC):

None.

### **Guideline E (Personal Conduct)**

Disqualifying Conditions (DC):

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire,...to...determine security eligibility or trustworthiness....

Mitigating Conditions (MC):

None.

### **General Policy Factors (Whole Person Concept)**

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (page 16 of Enclosure 2 of the Directive) include: (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; and, (8) the likelihood of continuation or recurrence.

### **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under Guideline J (criminal conduct) and Guideline E (personal conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

### **CONCLUSIONS**

Criminal conduct, violations of state or federal law, representing a history or pattern of criminal conduct, establishes doubt about a person's judgment, reliability and trustworthiness. A review of the offenses indicates the 1991 bar fight was Applicant's most serious criminal conduct because he was willing to place his career and life (and his brother's life) at risk. While Applicant may have been made the right decision to defend his brother's honor, Applicant exercised poor

judgment by even entering a neighborhood bar he had never been previously. Had Applicant been charged with more serious offenses, he may have also been punished under the UCMJ, and been discharged from the military. The seriousness of the 1991 conduct (DC 2) is successfully mitigated because Applicant has not been involved in similar conduct in over eleven years (MC 1; MC 2).

Applicant exercised poor judgment in April 1997 when he was arrested for smoking marijuana (DC 2). However, five years have passed without evidence of similar kind of activity (MC 1; MC 2).

Applicant's altered tag offense, suspended license offenses, and expired tag offense, represent multiple lesser offenses under DC 1 of the criminal conduct guideline. Since Applicant has provided no explanation for his expired tags or suspended license offenses, it is improper for me to speculate why it occurred. However, driving with altered tags establishes sufficient evidence for me to conclude Appellant intentionally tried to circumvent the law through deception. The recency of Appellant's deceptive conduct in April 2001 removes MC 1 from consideration, and compels an ultimate finding against Applicant under subparagraphs 1.a. and 1.b.

The Government has established a case under Guideline E. The information sought by the Government on the security application is relevant and material to the Government's investigation of Applicant for security clearance access, and the Applicant knowingly and willfully concealed the information (DC 2) with his "no" answers.

Applicant's intentional falsification of his April 1999 EPSQ could be mitigated if there is sufficient evidence to support one or more mitigating conditions. That evidence is not present here. MC 1 is inapplicable because a person's criminal record and financial status (which Applicant tried to conceal) are always pertinent to a determination of judgment, trustworthiness and reliability.

The seven falsifications occurred on the same form over three years ago. However, Applicant is ineligible to receive full mitigation under MC 2 because he did not provide the missing information until he was confronted with the information in the taking of the sworn statement in June 2000. With respect to subparagraphs 1.a. and 1.b., Applicant did not state his position until he received the SOR. Because Applicant did not disclose the criminal record information voluntarily, he cannot take advantage of MC 2 to mitigate his intentional falsifications.

Even if there was sufficient voluntariness under MC 2 to mitigate Applicant's intentional falsifications, MC 3 cannot be applied since Applicant did not make any good-faith efforts to correct the false information until he was presented with the information.

Applicant has indicated in Item 7 that he did not come forward with the drug use and a drug-conviction while in the military because he did not want to jeopardize his chances for employment at his employer. The desire to improve the chances of employment does not excuse the intentional concealment of relevant and material information because an applicant is obligated to be truthful during all phases of the security investigation. Applicant's intentional omission of material information from his security form suggests he cannot be counted on to tell the truth during a security investigation if potential adverse consequences follow for his own interests. In sum, I find against Applicant under Guideline E.

After a careful evaluation of the circumstances of this case under the whole person concept of Enclosure 2, I also find against Applicant. There is evidence of criminal conduct as recent as April 2001. Though Applicant submitted the EPSQ over three years ago, there is no evidence Applicant came forward voluntarily without first being confronted with the missing information. Accordingly, I find against Applicant under the whole person concept.

### **FORMAL FINDINGS**

Formal Findings required by paragraph 25 of Enclosure 3 are:

Paragraph 1(criminal conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. For the Applicant.

d. For the Applicant.

Paragraph 2 (personal conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. Against the Applicant.

d. Against the Applicant.

e. Against the Applicant.

f. Against the Applicant.

g. 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 securith clearance for Applicant.

Paul J. Mason

Administrative Judge