

DATE: March 18, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-23890

## DECISION OF ADMINISTRATIVE JUDGE

**ROBERT ROBINSON GALES**

### APPEARANCES

#### FOR GOVERNMENT

Catherine M. Engstrom, Esquire,

Attorney-Advisor to Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant's 1979 failure to register for the Selective Service within 30 days of his eighteenth birthday, as allegedly required under 50 U.S.C. App. § 453, is excused because, at that time, there was no such requirement. President Ford's Executive Order in March 1975 had terminated the registration requirements four years earlier. Applicant's subsequent failure to register once President Carter had reinstated registration requirements in July 1980, is uncharged conduct which, nevertheless, in this case, is mitigated. Clearance is granted.

### STATEMENT OF THE CASE

On August 26, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *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 (1) 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated September 11, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on November 22, 2002. (2) A complete copy of the file of relevant material (FORM) (3) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by January 4, 2003, (4) and he chose not to do so. The case was assigned to this Administrative Judge on March 6, 2003.

## FINDINGS OF FACT

Applicant has admitted the factual allegations pertaining to personal conduct under Guideline E. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 41-year old employee of a defense contractor, and is seeking to retain a security clearance, a clearance held since 1982. <sup>(5)</sup>

The Military Selective Service Act of June 24, 1948, <sup>(6)</sup> in part, set forth the obligations and privileges of serving in the armed forces in a free society. It generally provided: <sup>(7)</sup>

. . . it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such times or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Because of dissatisfaction with various loopholes and exemptions, perceived discrimination by race and class, and unhappiness over the Vietnam War, conscription became a major social issue leading to demonstrations at draft boards and induction centers. In addition, draft evasion through technicalities or fraud, became more common, and many registration-age young men either fled the country or went to prison. In 1973, conscription was abolished in favor of an all-volunteer army.

On March 29, 1975, President Gerald R. Ford issued Proclamation No. 4360, <sup>(8)</sup> revoking earlier proclamations, and terminated the procedures for registration under the Military Selective Service Act, as amended. From that date, and continuing until July 2, 1980, no Selective Service registration was required.

In August-September 1979, nearly 24 years ago, Applicant did not register for the Selective Service within 30 days of his 18<sup>th</sup> birthday, as he was allegedly required to do under 50 U.S.C. App. § 453. During the ensuing period, up to April 19, 2001, he has never registered for the Selective Service. <sup>(9)</sup> Applicant attributed his failure to a lack of awareness or lack of knowledge that he was required to register within 30 days of his 18<sup>th</sup> birthday. <sup>(10)</sup> No other conduct involving questionable judgment, untrustworthiness, or unreliability, or unwillingness to comply with rules and regulations, is alleged.

On July 2, 1980, in response to the Soviet invasion of Afghanistan, President Jimmy Carter issued Proclamation No. 4771, <sup>(11)</sup> reinstating Selective Service registration for males who were born on or after January 1, 1960, and who had attained their 18<sup>th</sup> birthday. <sup>(12)</sup> As a male born in August 1961, under the provisions of the Act, Applicant was required to present himself for registration "on any of the six days beginning Monday, July 1980." <sup>(13)</sup> He was previously under no legal obligation to register within 30 days of his 18<sup>th</sup> birthday, as erroneously alleged by the government, as no registration procedures were in effect during that period.

Applicant has been employed by the same company since August 1982, and he now serves as a building and grounds worker. The quality of his performance has not been revealed.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**[Personal Conduct - Guideline E]: 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 also include:**

(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:**

(5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security,"<sup>(14)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any

express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

### CONCLUSIONS

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

With respect to Guideline E, the government has failed to establish its case. By his own admission, Applicant did not register with the Selective Service within 30 days of his 18<sup>th</sup> birthday. But as indicated above, there was no such requirement under 50 U.S.C. App. § 453 that he do so at that time because the registration requirements were no longer in effect. President Ford had terminated the registration requirements in March 1975 - over four years before Applicant's 18<sup>th</sup> birthday. By the time President Carter reinstated the registration requirements in July 1980, Applicant was nearly 19 years old - long after the period of 30 days after his 18<sup>th</sup> birthday.

As noted above, as a male born in August 1961, under the provisions of the Act, Applicant was required to register on any of the six days beginning Monday, July 1980. This he failed to do. In fact, he failed to ever register, claiming a lack of awareness or lack of knowledge in that regard, a contention not disputed or rebutted by the government. He has not attributed his failure to any anti-war sentiment or a knowing political or religious refusal to register. It is clear that for someone "to knowingly fail to perform a duty, one must be aware of the duty and deliberately fail to perform it." (15) In this instance, Applicant was under a continuing duty to register commencing on Monday, July 28, 1980, as set forth in Executive Order 4771, until his 26<sup>th</sup> birthday, or August 1987. (16) Thereafter, there are no provisions for anyone older than 26 years of age to register for the Selective Service, because by that age, an individual is considered "too old to register." (17)

It has been nearly 23 years since Applicant failed to register in July 1980, and over 15 years since his registration obligation ceased. Since that time, Applicant has not been involved in any additional conduct which would raise questions regarding his judgment, trustworthiness, reliability, or willingness to comply with rules and regulations. Those facts activate Personal Conduct Mitigating Condition (MC) E2.A5.1.3.5. Moreover, by virtue of his spotless record since 1980, there is clear evidence of successful rehabilitation. In addition, the passage of years and his subsequent maturity have eliminated the registration requirement, and it is not likely to recur. A person should not be held forever accountable for conduct from the past when there is a clear indication of subsequent reform, remorse, or rehabilitation. Applicant's conduct was not intentional or knowing; it was not voluntary; it was not recent; it is highly unlikely to recur; and, with his candor regarding his failure to register, there is no further potential for pressure, exploitation, or duress. Even if the SOR had been accurately drafted, I would conclude, in this instance, Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case, and the allegation of the SOR would be concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

### 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. Guideline E: FOR THE APPLICANT

Subparagraph 1.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 grant or continue a security clearance for Applicant.

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Robert Robinson Gales

Chief Administrative Judge

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2. Although the actual submission is undated, the cover letter of transmittal is dated November 22, 2002.
3. The government submitted five items in support of its contentions.
4. The Memorandum of Assignment erroneously indicated the response was due on January 4, 2004, but in reality, it was due on January 4, 2003 - 30 days after receipt of the FORM. Also, the FORM was received on December 5, 2002, although Applicant erroneously indicated it was received on November 5, 2002.
5. See Item 3, (Response to SOR, dated September 11, 2002), at 2
6. Ch. 625, 62 Stat. 604.
7. 50 U.S.C. App. § 453(a).
8. Executive Order 44360, 40 F.R. 14567, 89 Stat. 1255, et seq.
9. See Item 4 (Security Clearance Application (SF 86), dated April 19, 2001), at 3 (see his negative response to question 18: "Have you registered with the Selective Service System?")
10. See Item 3, *supra* note 4, at 3.
11. Executive Order 4771, 45 F.R. 45247, 94 Stat. 3775.
12. *Id.*, § 1-101.
13. *Id.*, § 1-103.
14. See Executive Order 12968, "Access to Classified Information;" as implemented by Department of Defense Regulation 5200.2-R, "Personnel Security Program," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (see Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (see Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (see Enclosure 2, Sec. E2.2.2.)
15. *United States v. Koehn*, 457 F. 2d 1332, 1335 (10<sup>th</sup> Cir. 1972), citing *United States v. Williams*, 421 F.2d 600 (10<sup>th</sup> Cir. 1970)
16. Applicant's failure to comply with the Selective Service registration requirements in July 1980 might, if properly alleged in the SOR, have constituted conduct cognizable under Guideline E. His failure at that time would seem to fall within Personal Conduct (DC) E2.A5.1.2.5.
17. See Selective Service System website at: <http://www.sss.gov/when.htm>