

DATE: November 21, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-24315

## **DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Howry, Department Counsel

#### **FOR APPLICANT**

Stephan Math, Attorney At Law

### **SYNOPSIS**

Applicant's past criminal conduct is not recent, and his financial indebtedness has been mitigated by his circumstances largely beyond his control, specifically, extensive periods of unemployment. Following a divorce in 2000, he has made good faith efforts to resolve most of his indebtedness. Clearance is granted.

### **STATEMENT OF THE CASE**

On December 17, 2001, 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, (as amended) issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on March 25, 2002, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on July 26, 2002, and a notice of hearing was issued on July 30, 2002, setting the hearing for August 13, 2002. Applicant's attorney requested a continuance based upon good cause. The hearing was rescheduled for August 29, 2002. At the hearing the Government presented eleven exhibits. The Applicant presented six exhibits and called two witnesses to testify. The Applicant also testified on his own behalf. The Applicant submitted one Post Hearing Exhibit. The official transcript (Tr.) was received on September 9, 2002.

### **FINDINGS OF FACT**

The Applicant is 45 years old. He is employed as a Master Painter by a defense contractor and is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the

Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant was charged with Driving While License Suspended, a misdemeanor, in May 1992. He was sentenced to 2 years probation.

In May 1995, he was charged with (1) Driving While Under the Influence of Alcohol/Drugs, (2) Driving with a BAC of .08% or More, and (3) Unlicensed Driver. He pled guilty to Count 2, and was sentenced to 3 years summary probation, participation in an alcohol program and was fined \$1,151.00. His probation was revoked following a violation, and he was sentenced to 10 days in jail. Counts 1 and 3 were dismissed.

In December 1996, the Applicant was arrested for (1) Driving While License Suspended, a misdemeanor and (2) Defective Windshield, a misdemeanor. He pled nolo contendere to Charge 1 and was sentenced to 360 days in jail, with 330 days suspended for three years. He was given 3 years unsupervised probation and was fined \$500.00. Count 2 was dismissed. The Applicant testified that he satisfied all of the courts sentencing requirements and has engaged in no other criminal conduct. (*See*, Government Exhibits 6 and 7, Applicant's Exhibit F and Tr. p. 48).

Paragraph 2 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for clearance because he is financially overextended and at risk to engage in illegal acts to generate funds.

The Applicant and his wife separated in 1984/85 and were divorced about two years ago. Until 1991, his wife maintained custody of their two children, and he paid child support through a wage assignment. During this period, his child support payment was never in arrearage. From 1991 until 1998, pursuant to court order, the Applicant maintained custody of his two children. During this period, the Applicant did not have to pay child support. In 1998, the children moved back to live with their mother, and the Applicant once again began paying child support. He does not understand why the county records show that he has an arrearage. He has contacted the District Attorney and the matter is currently under investigation. The Applicant indicates that he should not owe child support arrearage, but if he does, he will pay it. (*See*, Tr. pp. 51-52 and Applicant's Post Hearing Exhibit). The Applicant is currently paying \$137.50 per pay period through a wage assignment for child support. (Tr. p. 69-70).

Over the past ten years, the Applicant has been laid off from work several times, and as a result, he fell behind in paying his bills. He was laid off three separate times, for almost a three year period, from 1989 to 1990, from 1994 to 1995 and from 1998 to 1999.

The Applicant admits that he was indebted to each of the creditors outlined in the SOR. Each of those creditors has now been paid in full, except his state taxes and child support. Applicant submitted copies of receipts to support this testimony. (*See*, Tr. pp. 49-52, Applicant's Exhibits A, B, C, and D, and Applicant's Post Hearing Exhibit).

The Applicant is currently making payments to the Internal Revenue Service in the amount of \$126.00 per month toward his back tax indebtedness. The Applicant plans to continue making regular payments until this debt is completely paid off. The state tax lien against him appears to have been released and paid. (*See*, Applicant's Exhibit D).

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant completed a Questionnaire for National Security Positions (Standard Form 86), dated March 3, 1998. In response to question 23(f), which asked, "In the last seven years, have you been arrested for, charged with, or convicted of any offenses(s)," the Applicant answered "No" to the question. He credibly testified that because he had already revealed his criminal history in a previous question, he thought that information would cover everything. (*See*, Government Exhibit 1, Questions 23(d) and Tr. pp. 54-55). Under the particular circumstances, I find no wilful falsification here.

The same questionnaire, in question 28 (f), asked, "In the last seven years, have you been over 180 days delinquent on

any debt(s)." The Applicant answered "Yes," to this question and disclosed two of his past due debts. He failed to disclose two others. He testified credibly that he had forgotten about the other two creditors, and did not intent conceal any information from the Government. (Tr. pp. 53-54). I find no wilful falsification here.

### Mitigation.

The Applicant's department manager who has been his direct supervisor for the past six years testified that he has had no problems with the Applicant on the job whatsoever. The Applicant was promoted into the department based upon his good reputation. He is considered very honest and dependable. (Tr. pp. 37-38).

The Applicant's production and control supervisor, who has known the Applicant since he was eight years old, and has worked along side him, considers him extremely honest and trustworthy. (Tr. pp. 42- 43).

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

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

#### Conditions that could raise a security concern:

1. Any criminal conduct, regardless of whether the person was formally charged;
2. a single serious crime or multiple lesser offenses.

#### Condition that could mitigate security concern:

1. The criminal conduct was not recent.

### **Guideline F (Financial Considerations)**

#### Conditions that could raise a security concern:

1. A history of not meeting financial obligations;
3. Inability or unwillingness to satisfy debts.

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

3. The conditions that resulted in the behavior were largely beyond the person's control (e.g. loss of employment, a business turndown, unexpected medical emergency or a death, divorce or separation;
6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

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

#### Condition that could raise a security concern:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances

- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

## CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of criminal conduct, financial irresponsibility and dishonesty which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant engaged in criminal conduct (Guideline J), and has experienced financial indebtedness (Guideline F). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

The Applicant's past misdemeanor criminal record is not recent, the last offense occurred over six years ago. He has satisfied the all of the courts sentencing requirements for each of the three separate offenses, and they are no longer of

security significance. Accordingly, I find for the Applicant under Guideline J (Criminal Conduct).

With respect to his finances, over the past ten years, the Applicant has been laid off three separate times, and unemployed for almost three of the past ten years. During these periods, he was forced to live off of just unemployment benefits. Unfortunately, during these periods, he was unable to pay some of his bills, including his child support. Following his divorce in 2000, the Applicant has shown good judgment. He has paid off almost all of his outstanding debts. He has just a few payments left before his back taxes are completely paid off. The child support arrearage appears to be an error, but either way, it is being investigated and he is committed to getting the matter resolved soon. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

The Applicant credibly testified that he did not intentionally conceal any information from the Government. He revealed the information he could remember and what he thought to be correct. Consequently, the evidence proves that the Applicant was as honest as he could be, although he was not completely accurate. Accordingly, I find for the Applicant under Guideline E (Personal Conduct).

On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Subpara. 2.b.: For the Applicant.

Subpara. 2.c.: For the Applicant.

Subpara. 2.d.: For the Applicant.

Subpara. 2.e.: For the Applicant.

Subpara. 2.f.: For the Applicant.

Subpara. 2.g.: For the Applicant.

Paragraph 3: For the Applicant.

Subpara. 3.a.: For the Applicant.

Subpara. 3.b.: 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 the Applicant.

Darlene Lokey Anderson

Administrative Judge