

DATE: February 3, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-25576

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a 38-year-old employee of a defense contractor. Applicant has a long history of financial problems. His bad debts were discharged in bankruptcy in 1996, but he soon acquired more delinquent debts. Applicant was able to pay off most of the delinquent debts which formed the basis for this action. Applicant also has a history of criminal conduct, including convictions for assault and battery and driving on a suspended license. Finally, Applicant falsely denied his criminal history and some of his delinquent debts on his security clearance application. Applicant has not mitigated the security concerns arising from his criminal conduct or his false statements. Clearance is denied.

### **STATEMENT OF THE CASE**

Applicant submitted an application for a security clearance on March 27, 2001. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, (Jan. 2, 1992), as amended and modified (the "Directive"). On December 30, 2003, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline F, Financial Considerations, Guideline J, Criminal Conduct, and Guideline E, Personal Conduct, of the Directive.

Applicant answered the SOR in writing on January 21, 2004. He elected to have a hearing before an administrative judge.

The case was assigned to me on September 10, 2004. With the concurrence of the parties, I conducted the hearing on October 28, 2004. At the outset of the hearing, department counsel moved to amend the SOR by adding a new ¶ 1.i and re-drafting the allegation in ¶ 2.a. Ex. 1; Tr. at 7-8. Applicant did not object and I granted the motion. Tr. at 11. The government introduced 13 exhibits. Applicant presented seven exhibits and testified on his own behalf. The DOHA received the transcript (Tr.) on November 10, 2004.

### **FINDINGS OF FACT**

Applicant denied the allegations in ¶¶ 1.b, 1.c, 1.d, 1.e, 1.f, 2.a, 2.d, 3.a, 3.b, and 3.c. of the SOR. Applicant's Answer to SOR, dated January 21, 2004; Tr. at 13. Applicant admitted the allegations in ¶¶ 1.a, 1.h, 1.i, 2.b, and 2.c, of the SOR. *Id.*; Tr. at 12. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 38 years old. Ex. 2 at 1. He has worked as a programmer for a defense contractor since 1994. Ex. 3 at 3. He seeks a security clearance.

Applicant entered active duty in the U.S. Navy in 1987 and rose to the rank of petty officer second class. *Id.* He was discharged from active duty in the Navy in August 1994 with an honorable discharge. *Id.* at 5.

Applicant got married in December 1991. Ex. 4 at 1. Applicant reported that his marriage was good until 1994, when tension arose between him and his wife. *Id.* He attributes this to the fact that his wife's parents moved in with them because of the parents' health and employment problems, and because he had an affair. *Id.*

Between 1994 and 1998, Applicant and his wife argued repeatedly, and the confrontations escalated into pushing and other physical contact. *Id.* at 1-2. They sometimes damaged property during their fights, by punching holes in the walls or breaking items. *Id.* Often one or the other called the police to quiet the disturbances.

In August 1995, Applicant's wife filed an affidavit in support of her request for a preliminary protective order. She asserted that on August 8 or 9, 1995, Applicant pushed her into the stove and struck her on her face, head, and chest. She was not injured and did not call the police, but claims she moved out of the house. About two weeks later, she requested the protective order. The state court granted the preliminary order on August 29, 1995. Ex. 9.

Applicant separated from his wife in early 1998. Ex. 4 at 1. In March 1998, Applicant's wife told the police that, during an argument, Applicant commanded his dog, a 70 lb. pit bull, to attack her. Ex. 10. She was bitten several times on the hand and arms. *Id.* Applicant denied he was present at the time of the attack. Ex. 4 at 2. Applicant was charged with felony assault, but was convicted of misdemeanor assault and battery. *Id.*; Ex. 3 at 1. The court referred the case to the local offenders program. Ex. 10 at 2. Applicant was required to complete a 16-week domestic violence education program and to pay a fine. *Id.* Applicant completed the requirements by March 1999. *Id.* at 4.

Applicant violated traffic laws on numerous occasions, by speeding, driving recklessly, and operating a vehicle while his license was suspended. Ex. 4 at 3; Ex. 11; Ex. 12. He failed to appear in court when required, and the court ordered warrants issued for his arrest. Ex. 4 at 3. In October 1999, Applicant was found guilty of reckless driving. Ex. 4 at 3; Ex. 11. The court imposed a fine and suspended his driver's license. In August 2000, while his license was still suspended, Applicant again drove recklessly. Ex. 4 at 3. Applicant was fined and jailed for five days for this offense. *Id.*

Applicant experienced continuing financial problems beginning in 1994. He stated that having to support his family and his wife's parent's while serving as an E-4 in the Navy caused severe financial strain. *Id.* at 1. Creditors repossessed Applicant's automobile in 1995. Ex. 3 at 10. In 1996, a bankruptcy court discharged his debts through a Chapter 7 bankruptcy action. Ex. 7.

Shortly after his discharge in bankruptcy, Applicant again experienced financial difficulties. Between 1997 and 1998, several accounts became delinquent or were charged off as bad debts. Ex. 5 at 10. Creditors garnished his wages in 1999. Ex. 3 at 9. Applicant had also judgments against him. *Id.*; Ex. 3 at 10.

In March 2001, Applicant applied for a security clearance by completing an SF 86, Security Clearance Application. Ex. 3 at 1. Question 26 on the SF 86 asked whether Applicant had been arrested for, charged with, or convicted of certain offenses. Ex. 3 at 7. Applicant answered, "No," to this question. *Id.* He did not report any of his arrests or the charges and convictions resulting from those arrests.

Question 19 on the SF 86 asked whether Applicant had consulted a mental health professional (including a counselor) or a health care provider about a mental health related condition. Ex. 3 at 6. He answered that question, "No." *Id.* Applicant did not report his attendance at the 16-week counseling program for domestic violence offenders.

Question 38 on the SF 86 inquired whether Applicant had been 180 days delinquent on any debts within the preceding seven years. *Id.* at 10. Applicant answered the question, "No." In response to other questions on the SF 86, Applicant had reported his bankruptcy action in 1996, a wage garnishment in 1999, a repossession in 1995, and two judgments against him in 1998 and 1999, respectively. Applicant did not report delinquencies for credit card accounts or installment sales.

Applicant filed for divorce in 1997, but it is not final. Tr. at 34; 52. Applicant supports his two-year old daughter by another woman. Tr. at 34, 38. Applicant no longer has a checking account, but gives money to his girlfriend to pay bills. Tr. at 67.

On April 5, 2004, Applicant's employer reported to security officials that the county garnished Applicant's salary in the amount of \$912.69 for unpaid personal property taxes. Ex. 13.

## 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information Within Industry* § 2 (February 20, 1960).

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline F, Financial Considerations - An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive, ¶ E2.A6.1.1.

Guideline J, Criminal Conduct - A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive, ¶ E2.A10.1.1.

Guideline E, Personal Conduct. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (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. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether

access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

### **Guideline F, Financial Considerations**

Paragraph E2.A6.1.2.1 of the Directive provides that it may be a disqualifying condition if the evidence reveals "[a] history of not meeting financial obligations." Similarly, ¶ E2.A6.1.2.3 indicates that an "[i]nability or unwillingness to satisfy debts" may be disqualifying. Applicant has a long history of not meeting his financial obligations. His inability to pay his debts led to his bankruptcy in 1996. Soon after his debts were discharged, Applicant was again seriously delinquent on several debts, leading to judgments and garnishment of his pay. I find Applicant has shown both a history of failing to meet his financial obligations and an inability to satisfy his debts. I conclude both these potentially disqualifying conditions apply.

The security concerns arising from Applicant's financial difficulties can be mitigated under certain circumstances. Under the Directive, ¶ E2.A6.1.3.1, it may be mitigating where "the behavior was not recent." Applicant had financial problems before his bankruptcy in 1996. Most of the debts alleged in the SOR arose between 1997 and 2002, and there was a garnishment action in April 2004. I conclude some of his conduct was recent, therefore this mitigating condition does not apply.

Paragraph E2.A6.1.3.2 of the Directive provides that it may be mitigating where the financial difficulty "was an isolated incident." Applicant's delinquent debts arose over many years because of a variety of reasons. I conclude this mitigating condition does not apply.

Under ¶ E2.A6.1.3.3, it may be mitigating where, "[t]he conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)." In July 2001 Applicant submitted a statement indicating the reason he suffered financial difficulties and bankruptcy in 1996 was that he had to support his parents-in-law. At the hearing, Applicant did not recall that; indeed he believed he was not in financial straits at that time. With regard to the financial difficulties he faced after his discharge in bankruptcy, Applicant admitted that it was due to poor management of his money. Tr. at 49. I find this mitigating condition does not apply.

Proof that "[t]he person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control," may be mitigating, under ¶ E2.A6.1.3.4 of the Directive. There is no evidence Applicant ever sought or received any financial counseling, although he is considering it in the future. I find this mitigating condition does not apply.

Finally, it may be mitigating where "[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Directive, ¶ E2.A6.1.3.6. Applicant paid off all the delinquent debts listed in the SOR except one. Exhibits A through G reflect payment or settlement of the debts listed in ¶¶ 1.b through 1.g, inclusive. Applicant has not paid the judgment listed in ¶ 1.a because he disputes the debt. I conclude this mitigating condition applies.

I considered the potentially disqualifying and mitigating circumstances in light of the "whole person" concept. I conclude Applicant mitigated the security concerns arising from his history of failing to meet his financial obligations and his inability to pay his debts.

## **Guideline J, Criminal Conduct**

Under the Directive, a history or pattern of criminal conduct "creates doubt about a person's "judgment, reliability and trustworthiness." Directive, ¶ E2.A10.1.1. The Directive sets out several conditions that could be disqualifying.

Paragraph E2.A10.1.2.2 of the Directive provides that a "single serious crime or multiple lesser offenses" may be disqualifying. Similarly, an "admission of criminal conduct" may be disqualifying under ¶ E2.A10.1.2.1 of the Directive. Applicant's admissions and the substantial evidence show that he has two convictions: one in 1998 for misdemeanor assault and battery, and one in 2000 for driving on a suspended license. Applicant admitted committing the second offense. I find Applicant has a history and a pattern of criminal conduct and admitted to criminal conduct. I conclude these potentially disqualifying conditions apply.

Paragraph 2.a of the SOR alleged, inter alia, that Applicant was arrested and charged with assault and battery in 1995. Department counsel amended the paragraph to allege only that a court issued a preliminary protective order requiring Applicant to stay away from his spouse. The evidence includes the affidavit filed ex parte by his wife two weeks after the alleged events. There is no evidence Applicant was convicted of the offense, and his wife did not testify. Applicant asserts he does not recall the incident. I am not persuaded that paragraph 2.a, as amended, alleges criminal conduct or that criminal conduct occurred.

Under the Directive, the security concerns arising from Applicant's criminal conduct may be mitigated under certain circumstances. Paragraph E2.A10.1.3.1 of the Directive provides that it is potentially mitigating where "[t]he criminal behavior was not recent." Applicant's convictions were for relatively minor offenses in 1998 and 2000, and resulted in minimal sentences. I find this behavior was not recent, therefore this mitigating condition applies.

It may also be mitigating if the "crime was an isolated event." Directive, ¶ E2.A10.1.3.2. Applicant had two criminal convictions within four years, as listed on the SOR in ¶¶ 2.b and 2.c. The first culminated a series of instances of domestic violence; the second was the last of a series of traffic violations. I find Applicant's criminal conduct was not an isolated event. This potentially mitigating condition does not apply.

Under the Directive, ¶ E2.A10.1.3.3, it may be mitigating where an applicant "was pressured or coerced into committing the act and those pressures are no longer present in that person's life." There is no evidence Applicant was pressured or coerced into committing any of these offenses. I find this potentially mitigating condition does not apply.

Under ¶ E2.A10.1.3.3 of the Directive, it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, it may be mitigating where "[t]here is clear evidence of rehabilitation." Directive, ¶ E2.A10.1.3.3. The state courts employed a series of corrective and rehabilitative measures designed to amend Applicant's conduct. A substantial period of time has passed without another incident of domestic violence or a traffic offense, suggesting that the corrective action was successful and that similar violations are not likely to recur. I conclude these potentially mitigating factors apply.

I considered all the circumstances in light of the "whole person" concept. Applicant's criminal conduct between about 1996 and 2001 reflects a serious lack of judgment, reliability and trustworthiness. I also considered Applicant's representation that he has matured and become more responsible. Unfortunately, considering Applicant's lack of candor in answering security clearance questionnaires in the past, I have serious reservations about his credibility. I conclude Applicant has not mitigated the security concerns arising from his criminal conduct.

## **Guideline E, Personal Conduct**

The Directive provides that personal conduct "involving questionable judgment, untrustworthiness, unreliability . . . or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information." Directive, ¶ E2.A5.1.1. The Directive sets out various factors that may be potentially disqualifying or mitigating.

Under the Directive, conduct demonstrating a lack of candor or dishonesty may raise security concerns. Specifically, ¶

E2.A5.1.2.2 provides that "the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . used to conduct investigations . . . [or] determine security clearance eligibility or trustworthiness . . ." may be disqualifying. In response to question 26 on the SF 86, Applicant falsely denied that he had been arrested for certain offenses during the preceding seven years. An arrest and conviction is usually a memorable experience; the fact that Applicant had several would not significantly diminish his ability to recall one or more of these incidents. Applicant's testimony that he forgot his numerous arrests and convictions is simply not credible. In response to question 38, Applicant falsely denied having any debts over 180 days delinquent within the previous seven years. Considering the extent of his financial difficulties, his bad checks, the multiple lawsuits and judgments against him, and his previous bankruptcy, I find Applicant knew that he had other delinquent debts and deliberately concealed the information. I conclude Applicant deliberately provided false information regarding material and relevant facts on his security clearance application. This disqualifying condition applies.

Paragraph 3.b of the SOR alleges Applicant deliberately falsified material facts on his security clearance application when he denied having consulted a mental health counselor, and did not disclose his attendance at a 16-week anger management course. Applicant described the course as group discussion sessions with other offenders in a double-wide trailer used as a classroom. He could not recall who led the discussion, and denied knowing the course leaders were qualified counselors. There was no evidence whether the discussion leaders were "mental health professionals" or "health care providers" as described in the security clearance application. I find Applicant's explanation credible.

Under the Directive, the security concerns arising from personal conduct may be mitigated under certain circumstances. Directive, ¶ E2.A5.1.3. I considered carefully each of the potentially mitigating conditions and conclude none of them apply.

I considered all the facts and circumstances in light of the "whole person" concept. I conclude Applicant has not mitigated the security concerns arising from his personal conduct.

### **FORMAL FINDINGS**

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i: For Applicant

Paragraph 2, Guideline J: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Paragraph 3, Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: For Applicant

Subparagraph 3.c: Against Applicant

**DECISION**

In light of all of 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 Applicant. Clearance is denied.

Michael J. Breslin

Administrative Judge