

DATE: November 14, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-00458

## DECISION OF ADMINISTRATIVE JUDGE

**HENRY LAZZARO**

### APPEARANCES

#### FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant was convicted of Driving Under the Influence of Alcohol (DUI) in 1989 and again in 1991, and Possession of Controlled Substances (PCS) in 1994. He was sentenced to serve two years in jail (suspended) for the PCS offenses. He failed to disclose his criminal, drug and alcohol history, and a number of delinquent financial accounts in a Security Clearance Application (SF 86) he submitted on October 28, 1999. He has failed to mitigate the security concern caused by his personal conduct in providing false answers in the SF 86. Further, he is unable to mitigate the security concern his criminal conduct has created because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

### STATEMENT OF THE CASE

On May 28, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, for criminal conduct, and Guideline E, for personal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR on July 8, 2003, and requested a hearing. Applicant admitted all allegations contained in the SOR. Applicant included nineteen documents with his answer to the SOR. At the hearing, I marked those documents Applicant Exhibits (AE) 1-19. AE 1-18 were admitted and made part of the record without an objection. I refused to admit AE 19 on my own objection because it was written in a foreign language and a translation was not provided.

This case was assigned to me on September 24, 2003. A notice of hearing was issued on October 3, 2003, scheduling the hearing for October 15, 2003.<sup>(2)</sup> The hearing was conducted as scheduled. The government submitted six documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-6. GE 1 & 2 and 4-6 were admitted and made part of the record without an objection. I refused to admit GE 3 on my own objection because it was written in a foreign language and a translation was not provided. Applicant testified and submitted five additional documentary exhibits that were marked AE 20-24 and admitted into the record without an objection. The transcript was received on October 23,

2003.

### **FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 34 years old, has been married since September 28, 1995, and has one daughter who is five years old. He is employed by a defense contractor as an inventory plan and control manager. Applicant was originally hired by his present employer as a material expeditor on December 17, 1998. The numerous certificates of completion and letters of recommendation submitted by Applicant attest to his reputation as a dependable, trustworthy, honest, and widely respected individual. They also establish he is an excellent and valued employee.

Applicant was charged with Driving Under the Influence of Alcohol (DUI) in 1989 and convicted of that offense on February 27, 1990. He was sentenced to pay a fine and ordered to attend an alcohol awareness seminar. He was again convicted of DUI in 1991, and was once again sentenced to pay a fine and attend an alcohol awareness seminar.

Applicant was convicted of Possession of Controlled Substances (PCS) in July 1994 and sentenced to a term of two years in jail (suspended), placed on two years probation, and ordered to attend a drug treatment program. Applicant had first begun using controlled substances in approximately 1987. From 1991 until the time of his arrest Applicant used cocaine and/or heroin on an almost daily basis. He estimated he was spending approximately \$100.00 to support his drug habit, and was getting that money from his mother or through using credit cards to purchase items that he would later sell.

Applicant had entered two treatment programs before the court-ordered program that was required as part of his sentence following his 1994 arrest. He opted to enter into a substantially more demanding program than was required as part of that sentence. He entered the residential portion of that program in June 1995, and successfully completed that portion of the program approximately four months later. He continued with the outpatient part of the program and completed the level 2 and 3 portions in 1996. His prognosis on discharge was "excellent" and he has remained abstinent from drugs since that time. The records of his arrests were ordered to be sealed and kept confidential in 1997. At present, he drinks alcohol only on special occasions and never more than minimal amounts.

Applicant submitted a Questionnaire for National Security Positions (SF 86) on October 28, 1999 in which he answered "No" to questions 21-(3), 24 (4), and 27-(5). As disclosed by his arrests for DUI and PCS, and admissions to substantial illegal drug usage, (6) those answers were false. Applicant knowingly and intentionally provided false answers to those questions because he was afraid of the negative effect that truthful answers might cause with his employment.

Applicant also answered "No" to question 19-(7) in the SF 86. He testified credibly that he was confused by this question. Further, the evidence does not support a finding that Applicant was required to answer this question in the affirmative. Lastly, Applicant answered "No" to question 38-(8) in the SF 86. When he provided that answer he had numerous credit card and other accounts that had been delinquent for years. (9) Applicant knowingly and intentionally provided a false answer to this question.

Applicant was questioned by a special agent of the Defense Investigative Service on June 27, 2000, and ultimately provided a sworn statement. (10) Upon being questioned, Applicant twice denied having been arrested for the DUIs and PCS and also denied having any delinquent accounts. It was only after the special agent informed him of the specific allegations of drug use, arrests, and financial delinquencies that Applicant provided information about those issues.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

### **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (11) The government has the burden of proving controverted facts. (12) The burden of proof in a security clearance case is (13)

something less than a preponderance of evidence , although the government is required to present substantial evidence to meet its burden of proof.<sup>(14)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(15)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(16)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(17)</sup>

No one has a right to a security clearance<sup>(18)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(19)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(20)</sup>

### CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. Applicant was convicted of DUIs in 1989 and 1991, and of PCS in 1994. He was sentenced to serve two years in jail (suspended) for the PCS offense. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 3: *Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year* apply in this case.

I find that Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply to all three convictions. Applicant has successfully mitigated the security concern caused by his two DUI convictions. However, because of the 10 U.S.C. § 986 mandatory disqualification, Applicant is unable to mitigate the concern caused by his PCS conviction and the two-year jail sentence (suspended) that was imposed as a result. Guideline J is decided against Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Appellant's lack of candor in failing to disclose his arrests, drug abuse history and financial condition when he submitted the SF 86 and again when he was questioned by the special agent severely undermines the ability to place such trust and confidence in Appellant at the present time. His false and/or misleading answers raise significant security concerns.

DC 2: *The deliberate omission, concealment, or falsification of relevant and material fact*

*from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*; and DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination* apply in this case. I have considered all mitigating conditions under Guideline E and do not find that any apply. Guideline E is decided against Applicant.

### FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: For the Applicant

Subparagraph e: 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 security clearance for Applicant.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant was given notice of the approximate date of the hearing by Department Counsel on September 24, 2003. (Tr. pp. 18-19) A conference call was held with Applicant, Department Counsel and myself the week before the hearing during which Applicant stated he was prepared to proceed on October 15, 2003. (Tr. p. 19) Applicant again stated at the hearing he was prepared to proceed and did not require additional time to prepare. (Tr. p. 19)
3. *Your Police Record - Felony Offenses - Have you ever been charged with or convicted of any felony offense?*
4. *Your Police Record - Alcohol/Drug Offenses - Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.*
5. *Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs - Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics, (LSD, PCP, etc.), or prescription drugs?*
6. GE 2
7. *Your Medical Record - In the last 7 years, have you consulted a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?*
8. *Your Financial Delinquencies - 180 Days - In the last 7 years, have you been over 180 days delinquent on any debt(s)?*
9. Applicant acknowledged having over \$21,900.00 in delinquent accounts in the statement he provided to a Special Agent of the Defense Investigative Service on June 22, 2000. GE 2
10. GE 2
11. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
12. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
13. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
14. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
15. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
16. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
17. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
18. *Egan*, 484 U.S. at 528, 531.

19. Id at 531.

20. *Egan*, Executive Order 10865, and the Directive.