

DATE: June 30, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-03414

## DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

### APPEARANCES

#### FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Over a period of years, Applicant's supervisors found his job performance as a security guard

to be unsatisfactory because he failed to follow established procedures and policies and was inattentive to his duties. He was removed from assignments for cause and subsequently counseled and given guidance about how to improve his work performance. Applicant's continuing poor performance caused him to be fired from employment in 1999. Applicant falsified his security clearance application by failing to disclose his discharge as a security guard. Clearance is denied.

### STATEMENT OF THE CASE

On August 16, 2002, pursuant to Executive Order No. 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, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant that specified reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In the SOR, the Government alleged that Applicant was disqualified from obtaining a security clearance because of personal conduct (Guideline E) and criminal conduct (Guideline J). On September 2, 2002, DOHA received Applicant's response to the SOR. Applicant requested that his case be determined on the record in lieu of a hearing. The Government submitted its File of Relevant Material (FORM) on April 1, 2003. The FORM contained documents identified as Items 1 through 18. By letter dated April 4, 2003, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. On May 12, 2003, DOHA received additional information submitted by Applicant in response to the FORM. Included in Applicant's information

were 4 exhibits. On May 30, 2003, the case was assigned to me for a decision.

## FINDINGS OF FACT

In his answer to the SOR, Applicant denied all of the factual allegations involving Guideline E, Personal Conduct, with the exception of allegation 1.b.(2), which he admitted. Applicant did not admit or deny the allegation identified as 2.a. under Guideline J, Criminal Conduct, but denied allegation 1.c under Guideline E, which is the falsification referred to in allegation 2.a. of Guideline J. Applicant's admission of allegation 1.b.(2) is incorporated as a finding of fact.

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

Since 1987, the Applicant, who is now 59 years of age, has worked as a telecommunications specialist, senior computer operator, and security guard. In the SOR, the Government alleges that Applicant was fired from a position as a senior computer operator in 1993; Applicant denies the allegation. Neither party supplies persuasive evidence in support of its contentions.

During the period 1994 through 1999, Applicant was employed as a security guard by a company which supplied security services to third party businesses. (Item 4) During the two-year period between October 1995 and September 1997, Applicant was cited for six serious deficiencies in the performance of his duties. In August 1997, he was placed on a Performance Improvement Plan (Item 5), and, on approximately September 15, 1997, he was transferred for cause by his employer and reassigned, with a cut in pay, to another client business, under a condition of administrative oversight. (Item 7) On July 16, 1998, the site manager for the security company informed her supervisor that Applicant had been removed from the second site "after numerous complaints from the client." (Item 12) Applicant was again reassigned to another client business, where, on November 18, 1998, he was cited by his employer for violations of attitude and conduct which occurred on November 15, 1998. (Item 8) Applicant was further counseled on improving his job performance by the company's Assistant Director of Operations on December 2, 1998. On January 12, 1999, the Applicant was instructed to meet with the company's Regional Director, but failed to do so. By memorandum dated January 23, 1999, the Area Manager informed the Regional Manager that Applicant's "lackadaisical attitude, substandard performance of duties, and blatant disregard for authority in general" had "done nothing but undermine" the security operations of the firm. He further recommended that Applicant be fired from the company. (Item 13) The record further recites that the company provided a notice, dated February 7, 1999, of Applicant's discharge to the state employment commission and stated that Applicant was "[d]ischarged for continuous substandard performance & policy violations." (Item 15)

On July 15, 2000, Applicant completed a Security Clearance Application (SF-86), containing a question 20, which asked whether, in the previous 10 years, Applicant has been fired from a job, quit a job after he has been told he would be fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory performance, or left a job for another reason under unfavorable circumstances. Applicant responded "No" to Question 20 on his SF-86. While Applicant did not sign and date his application or acknowledge his awareness that it is a violation of 18 U.S.C. § 1001 to falsify a response to a question on a security clearance application, he did state in his answer to the SOR that he was aware of the consequences of falsifying official government documents. (Answer to SOR, at 14.) Applicant did not deny that he had executed the SF-86 offered in evidence in the FORM.

Applicant submits four exhibits to rebut the Government's allegation that it is not in the interest of national security to grant him a security clearance. Two of his exhibits are commendations from his supervisor in March 1995. The third exhibit is a certificate commending him for being employed by the security service firm for five years, and the fourth document states that Applicant successfully completed a two-hour course of instruction in information gathering and report writing.

## 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 restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information*, §3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. *See* Directive, Enclosure 2.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore properly concerned where available information indicates that an applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An evaluation of whether the applicant meets the security guidelines includes consideration of a number of variables known as the whole person concept. In evaluating the relevance of an individual's conduct, the administrative judge must consider the following factors: (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; (8) the potential for pressure, coercion, exploitation, or duress; (9) the likelihood for continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Adjudicative Guidelines E, Personal Conduct (Attachment 5 to Enclosure 2), and J, Criminal Conduct (Attachment 10 to Enclosure 2) are most pertinent to this case. The security issues identified under Guideline E which apply to the facts of this case are:

E2.A5.1.1. The Concern: 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 security concerns and may be disqualifying are

E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts 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;

E2.A5.1.2.5. A pattern of dishonesty or rule violations.

In this case, the following condition could mitigate security concerns :

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2: The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

The security concern identified under Guideline J is that a person who has a history or pattern of criminal activity creates doubt about his or her judgment, reliability and trustworthiness. The following condition could raise a security concern in this case and may be disqualifying:

E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

Conditions that could mitigate Guideline J security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.3. The crime was an isolated incident;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

### **Burden of Proof**

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless clearly consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. In *Egan*, 484 U.S. at 531, the Supreme Court concludes that "[t]he clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Accordingly, doubts against an applicant's security worthiness are to be resolved against the applicant.

### **CONCLUSIONS**

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

Subparagraph 1.a. of the SOR alleges, under Guideline E, Personal Conduct, that Applicant was fired from a position in February 1993 because he was unwilling to follow managerial direction and failed to respond to formal and informal counseling. Subparagraph 1.b. of the SOR alleges that Applicant was discharged from his position as a security guard in January 1999 because of his "lackadaisical attitude, substandard performance of duties, and blatant disregard for authority." Subparagraph 1.b. lists the following security infractions attributable to Applicant:

While assigned to work for employer A: Abandonment of post and posting without firearm in October 1995 and November 1995 (SOR subparagraph 1.b.(1)). Dereliction of duty in January 1997 and July 1997 by reading while on assignment. (SOR subparagraph 1.b.(2)). Permitting improper access to a visitor in August 1997, while assigned to monitor an interior turnstile. These cumulative infractions resulted in Applicant being placed on a Performance Improvement Plan (SOR subparagraph 1.b.(3)). Permitting improper access to a visitor in September 1997 while assigned to monitor a main gate. Applicant relieved of position with Employer A (SOR 1.b.(4)).

Applicant reassigned to work for employer B. Applicant removed from assignment with employer B in July 1998 after he was observed reading a book on duty and failing to respond to alarms. (SOR 1.b.(5)).

Applicant reassigned to employer C. Applicant failed to accurately sign in a visitor in November 1998 while on

assignment with employer C. Applicant's conduct and demeanor resulted in visitor becoming emotionally upset. (SOR 1.b.(6)).

Applicant refused to follow security company's procedures for scanning bar codes while assigned to work for employer C. Applicant's final refusal to follow rules and regulations resulted in him being fired from the security company. (SOR 1.b.(7)).

Subparagraph 1.c. of the SOR alleges, under Guideline E that Applicant deliberately failed to list that he had been fired from the two positions identified in the SOR at 1.a and 1.b. Subparagraph 2.a. of the SOR alleges that the information put forth at subparagraph 1.c constitutes a felony pursuant to 18 U.S.C. §1001.

Applicant denies all allegations in the SOR, with the exception of the allegation in subparagraph 1.b.(2), identified as dereliction of duty by reading while on assignment.

The Government presents no evidence to support its allegation that Applicant was fired from his job in 1993. Because the Government does not meet its burden of proof as to subparagraph 1.a. and Applicant denies the allegation, I find for Applicant as to Subparagraph 1.a.

Subparagraph 1.b. of the SOR alleges Applicant was fired in January 1999 from his position as a security guard and lists the security infractions leading to his dismissal. Applicant admits the conduct alleged in subparagraph 1.b.(2) of the SOR, and thus the Government is relieved from proving that specific allegation. The Government establishes its case as to the remaining elements of subparagraph 1.b. of the SOR when it puts forward reliable, unfavorable information provided by Applicant's supervisors, employers, and coworkers of disqualifying personal conduct (E2.A5.1.2.1), which also demonstrates a pattern of rule violations (E2.A5.1.2.5). Applicant supplies no credible evidence in mitigation. He fails to show that the information supplied by his supervisors and coworkers was unsubstantiated or not pertinent to a determination that he lacked requisite judgment, trustworthiness or reliability to hold a security clearance. Accordingly, I find against Applicant as to subparagraph 1.b. of the SOR.

Subparagraph 1.c. of the SOR alleges disqualifying conduct under subparagraph E2.A5.1.2.2 of Guideline E, Personal Conduct, and states that Applicant falsified material facts on his SF-86 when he answered "no" to Question 20 and thereby denied he had been fired from positions in 1993 and 1999. Applicant's false response to Question 20 on his SF-86 was not mitigated by conditions identified in Guideline E: the falsification of his firing in 1999 was recent and not an isolated incident. The record does not indicate that Applicant supplied correct information voluntarily or before he was confronted with the facts. *See* ¶¶ E2.A5.1.3.2 and E2.A5.1.3.3. The record further indicates that Applicant's subsequent supervisors were not aware that he had been fired from his security guard position and that they attested to the correctness of his false answers. (Item 4.) I find for the Government as to subparagraph 1.c. of the SOR.

Subparagraph 2.a of the SOR alleges that the falsification alleged in subparagraph 1.c. above also constitutes criminal conduct pursuant to 18 U.S.C. § 1001. The FORM includes as Item 4 a copy of Applicant's SF-86, dated July 15, 2000. The SF-86 is not signed by Applicant and the SF-86 does not contain the standard certification by the person completing the SF-86 that he understands that a "knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United State Code.)" Applicant denies deliberately falsifying facts on the security clearance application and states that he was never given formal notice of dismissal in 1999 from his position, although documents in the record submitted by the Government indicate Applicant was on notice in February 1999 that he had been fired in January 1999 for "continuous substandard performance and policy violations." *See* Items 14, 15, 16 and 17. I conclude, therefore, that Applicant's failure to list his 1999 discharge from his position as a security guard constitutes disqualifying criminal behavior under Guideline J, as well as disqualifying conduct under Guideline E, Personal Conduct. Mitigating conditions E2.A10.1.3.1, E2.A10.1.3.3, and E2.A10.1.33.6 under Guideline J are inapplicable in this case. I find against Applicant as to Subparagraph 2.a. of the SOR.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of evidence and under all of the Directive guidelines that were generally applicable or might be applicable under the facts of the case. Under the whole person concept, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance.

## 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, Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.b.(1): Against the Applicant

Subparagraph 1.b.(2): Against the Applicant

Subparagraph 1.b.(3): Against the Applicant

Subparagraph 1.b.(4): Against the Applicant

Subparagraph 1.b.(5): Against the Applicant

Subparagraph 1.b.(6): Against the Applicant

Subparagraph 1.b.(7): Against the Applicant

Subparagraph 1.c.: Against the Applicant

Paragraph 2, Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 2.a.: 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 the Applicant. Clearance is denied.

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Joan Caton Anthony

Administrative Judge