

DATE: June 2, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-06303

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's 1995 convictions for larceny and breaking and entering and subsequent sentences to two and three years imprisonment, respectively, requires revocation of his clearance under 10 U.S.C. §986 notwithstanding that Applicant spent 30 days in prison on the first offense and no time in prison on the second offense. Applicant did not falsify his clearance application. Clearance denied.

**STATEMENT OF THE CASE**

On 16 January 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 4 February 2003, Applicant answered the SOR and requested a hearing. The case was assigned to me on 25 March 2003 and I received and set the case the next day. I issued a Notice of Hearing on 27 March 2003 for a hearing on 30 April 2003.

At the hearing, the Government presented five exhibits--admitted without objection--and no witnesses; Applicant presented five exhibits and the testimony of one witness, himself. DOHA received the transcript on 9 May 2003.

**RULINGS ON PROCEDURE**

At the hearing, I gave the Applicant until the close of business on 9 May 2003 to provide a signed copy of Applicant's Exhibit D (A.E. D) for substitution into the record. On 7 May 2003, I received a memorandum from Department Counsel forwarding, without objection, the facsimile copy of the signed exhibit received on 6 May 2003. I have entered the substituted copy into the record as A.E. D.

**FINDINGS OF FACT**

Applicant admitted the criminal allegations of the SOR, but denied falsifying his clearance application; accordingly,

Applicant's admissions are incorporated as findings of fact. Applicant also admits the applicability of 10 U.S.C. §986 to this case, but requests a waiver.

Applicant--a 30-year-old employee of a defense contractor--seeks access to classified information. He has not previously held a clearance.

In June 1995, Applicant--age 22--was a scholarship basketball player at a small university in his home state. He had just moved into a new apartment off-campus with a new roommate, also a scholarship basketball player. He began to notice that his roommate was acquiring expensive items that Applicant knew he could not afford to buy; when asked, the roommate admitted he was stealing the items from open garages and unlocked cars. Applicant did not turn his roommate in. He overlooked his roommate's continued thefts, occasionally drove his car to aid in the thefts, and took a fishing pole and tool box from an open boat on another occasion. Applicant and his roommate traveled to Applicant's hometown in another part of the state during the summer. On their way home, Applicant discovered that his roommate had stolen some items while on the trip. Applicant did not turn around, but continued back to college.

The jig was up in August 1995. The roommate was caught in the act, but fled the police, abandoning Applicant's car, that he had borrowed. The next day, 11 August 1995, Applicant and his roommate were arrested and ultimately charged with multiple counts of first and second degree theft, third degree burglary, and unlawful breaking and entering of a motor vehicle (G.E. 3).

Applicant cooperated in the police investigation, and in December 1995 pleaded guilty to first and second degree theft. He was sentenced to two years imprisonment on each count, to run concurrently. He was ordered to serve 30 days beginning 1 June 1996; the balance of the sentence was suspended for two years conditioned on good behavior and payment attorneys fees, court costs, and nearly \$4,800.00 restitution. Applicant satisfactorily completed the conditions of his suspended sentence.

After sentencing, Applicant returned home for Christmas, and on 27 December 1995, was charged with breaking and entering a vehicle; these were not new charges, but were part of the summer crime spree. Applicant did not appear in court, but signed a number of documents. He was later sentenced to three years in prison--suspended--and three years probation.

As a result of his criminal conduct, Applicant lost his basketball scholarship and was suspended from school for a semester. However, he returned to school and obtained his undergraduate degree in biology. He married in August 1999. He began pursuing a master's degree that he will complete in summer 2003. He had no criminal involvement before the summer of 1995, and--with the exception of one incident discussed below--none after the summer of 1995.

On 8 March 2001, Applicant executed a Security Clearance Application (SCA)(G.E. 1) on which he disclosed his 11 August 1995 felony arrest and subsequent conviction in response to question 21. He did not disclose the 27 December 1995 arrest in response to question 26 (other arrests). Nor did he disclose a 27 August 1997 arrest for assaulting his girlfriend. (2) Applicant testified credibly that he did not list the December 1995 arrest because he considered it part and parcel of the 11 August 1995 arrest that he listed. He testified credibly that he did not remember the August 1997 arrest and knew that his felony arrest would be the biggest impediment to obtaining his clearance (Tr. 43-44).

Applicant's character witnesses--including the police chief from his home town--consider him an honest, trustworthy individual who has overcome his past problems and become a model employee (A.E. A-E).

At the hearing, Applicant took full responsibility for his past irresponsible and criminal conduct. He acknowledged that he knew better. His remorse was clear, as were the efforts he had made to turn his life around.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section 6.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition

for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*, under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **CRIMINAL CONDUCT (GUIDELINE J)**

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

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

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year. <sup>(3)</sup>

E2.A10.1.3. Conditions that could mitigate security concerns include:

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

E2.A10.1.3.2. The crime was an isolated incident.

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

E2.A10.1.3.7. Potentially disqualifying conditions 3. . . , above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver. <sup>(4)</sup>

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, §986 [the Smith Amendment], precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

### **PERSONAL CONDUCT (GUIDELINE E)**

E2A5.1.1. 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. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

E2.A5.1.3. Conditions that could mitigate security concerns include:

Not applicable.

### **Burden of Proof**

Initially, the government must prove controverted facts alleged in the SOR. If the government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. Where facts proven by the government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

### **CONCLUSIONS**

The government has established its case under Guideline J, which cannot be mitigated under 10 U.S.C. §986. The statute requires that I not renew Applicant's clearance because he was sentenced to two and three years imprisonment respectively on his 11 August 1995 arrest and 27 August 1995, notwithstanding that he served only thirty days on the first offense and none on the second, and completed his probations without incident. However, Applicant's criminal conduct was confined to a distinct period of time nearly eight years ago, has not been repeated, and was due in large part to the immaturity of the pampered--even in a small college--scholarship athlete. However, Applicant has clearly grown up after nearly ruining his life. I would consider his criminal conduct mitigated but for 10 U.S.C. §986. Accordingly, I would grant Applicant's clearance were I free to do so under the existing disqualifying and mitigating factors.

Unfortunately for Applicant, the law requires me to revoke his clearance. However, because I do so solely because of the requirements of 10 U.S.C. §986, I make the following statement as required under O.I. 64: I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

The government has established the fact of the two alleged omissions, but has not established its case under Guideline E because the omissions were not deliberate. He disclosed the felony arrest and conviction on 11 August 1995 and reasonably believed that the December 1995 charges were covered by the arrest he disclosed. He simply forgot the 1997 arrest, an arrest without independent security significance. Consequently, Applicant lacked the intent to mislead the government. I resolve Guideline E for Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: Against the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For 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.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated 2 January 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).
2. Applicant acknowledges striking his girlfriend (slapping as opposed to hitting her with his fist) when they got into an argument and she started destroying his personal property, including expensive stereo equipment. The complainant police officer reports the victim acknowledging her destruction of Applicant's personal property (G.E. 4). The charges were nolle prossed. The government did not alleged this more recent arrest under Guideline J, indicating its lack of security significance.
3. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.
4. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.