

DATE: April 13, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-07191

**REMAND DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

On Remand, error of identification of Applicant's sex and age have been corrected. His criminal conduct, drug involvement and alcohol abuse have been mitigated, as the problems occurred a number of years ago and there is no indication of recent problems. Applicant's attempt to conceal his criminal history and employment history on his security clearance application has not been mitigated. Clearance is denied.

**STATEMENT OF THE CASE**

On February 6, 2003, 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, 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 21, 2003, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on July 1, 2003. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on July 9, 2003, and he submitted no reply. The case was assigned to the undersigned for resolution on August 13, 2003. An unfavorable security clearance decision was issued on November 26, 2003. On arch 25, 2004, the DOHA Appeal Board remanded the case to this Administrative Judge for correction of errors relating to the identification in the decision of the Applicant's sex and age.

**FINDINGS OF FACT**

The Applicant is 31 years old. He is employed by a defense contractor as a Jr. Systems Administrator, and is seeking to retain his security clearance in connection with his employment.

The Government opposes the Applicant's request for a continued 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 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant admitted all of the allegations set forth in the SOR under this guideline. He was cited and charged with Possession of Marijuana Less Than One Ounce in October 1992. He was found guilty of the charge and was sentenced to pay a fine totaling \$280.00. (*See*, Government Exhibits 3 and 5).

In June 1994, the Applicant was arrested and charged with Resisting Arrest, Marijuana Possession, Failure to Yield at a Stop Sign, License Violation, and Failure to Appear. In August 1994, the Applicant was found guilty of Resisting Arrest. He was fined \$2,000.00 and placed on probation for one year. (*See*, Government Exhibits 3, 5, 6 and 7).

In May 1995, the Applicant was arrested for Driving Under the Influence of Alcohol. He pled guilty to DUI, was sentenced to five years probation, required to serve two days in custody, and ordered to pay fines and fees totaling \$1,447.00. (*See*, Government Exhibits 3 and 5).

Paragraph 2 (Guideline H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because he has abused illegal substances.

The Applicant admitted all of the allegations set forth in the SOR under this guideline. He began using marijuana in high school in 1989, or 1990. He smoked it with friends once or twice a week at someone's home or in the surrounding desert. He continued to use marijuana until 1994. He occasionally purchased marijuana spending about twenty dollars on each purchase. During this same period the Applicant used methamphetamine on one occasion and LSD on two occasions. Due to his hallucinations and the bad experience he incurred, he did not use these drugs again. (*See*, Government Exhibits 3 and 5).

Paragraph 3 (Guideline G - Alcohol Consumption). The Government alleges that the Applicant is ineligible for clearance because he abuses intoxicants.

The Applicant's arrest in May 1995 for Driving Under the Influence was discussed above.

Paragraph 4 (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 Security Clearance Application (Standard Form 86) dated February 20, 2001. Question 24, of the application asked the Applicant if he had ever been charged with or convicted of any offenses related to alcohol or drugs. The Government's SOR inaccurately alleges that the Applicant responded to Question 24 by answering "NO". The Applicant actually answered "YES", and listed his arrest in May 1995 for Driving Under the Influence. (*See*, Government Exhibit 4). The Applicant failed, however, to list his arrest in June 1994, for Resisting Arrest, Marijuana Possession, Failure to Yield at a Stop Sign, License Violation and Failure to Appear. He also failed to list his citation in October 1992, for Possession of Marijuana Less Than One Ounce.

The same questionnaire, at Question 20, asked the Applicant if within the last ten years he had been fired from a job, quit a job after being told he'd be fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory job performance, or left a job for other reason under unfavorable circumstances. The Applicant answered "NO". (*See*, Government Exhibit 4). The Applicant failed to disclose that he had been fired by one of his employers within the last ten years. (*See*, Government Exhibit 5).

The Applicant explained that in response to question 24, he listed only his arrest in May 1995, because he thought that the question only required him to respond to the past seven years. He stated that it was not his intention to provide misleading or omit pertinent information. I do not find the Applicant credible. With regard to question 20, the Applicant claims that he was not "technically" fired from a past employer. (*See*, Applicant's Answer to SOR). The information he

provided to the Defense Department in his sworn statement to the Defense Security Service, (DSS) however, is inconsistent with what he stated in his answer to the SOR. In his sworn statement to DSS dated September 20, 2001, he states that he was in fact fired from his past employer for discussing wages with another employee which was against company policy. (See, Government Exhibit 5).

### POLICIES

Enclosure 2 and Section E.2.2. 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. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

##### Condition that could mitigate security concerns:

6. There is clear evidence of successful rehabilitation.

#### Guideline H (Drug Involvement)

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

1. any drug abuse;
2. illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution.

##### Condition that could mitigate security concerns:

1. The drug involvement was not recent.

#### Guideline G (Alcohol Consumption)

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

1. alcohol-related incidents away from work, such as driving under the influence . . . ;
4. habitual or binge consumption of alcohol to the point of impaired judgement.

##### Condition that could mitigate security concerns:

2. The problem occurred a number of years ago and there is no indication of a recent problem.

#### Guideline E (Personal Conduct)

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

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.

Conditions that could mitigate security concerns:

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 criminal conduct, illegal drug use, alcohol abuse and dishonesty that 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 has engaged in criminal conduct (Guideline J); illegal drugs use (Guideline H); alcohol abuse (Guideline G); and dishonesty (Guideline E). 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 not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guideline E of the SOR.

The Applicant's criminal history, drug involvement and alcohol abuse occurred between 1989 and 1995. During this period he abused marijuana, methamphetamine, LSD and alcohol. He was arrested on three separate occasions, two of which were drug related arrests, and one arrest for Driving Under the Influence of Alcohol. Since 1995, he has not been arrested. There is no evidence that the Applicant has engaged in criminal history, illegal drug involvement or alcohol abuse since 1995, a period of eight years. Given the fact that the Applicant's problems occurred a number of years ago, and there is no indication of recent problems, sufficient rehabilitation and mitigation has been shown. Accordingly Guidelines J, H and G are found for the Applicant.

It is unclear from the record why the Applicant did not reveal his complete criminal history or employment history in response to questions 24 and 20 on his security clearance application. With the particular evidence that I have been provided, however, there is no reasonable excuse for his failure to answer the questions truthfully. Consequently, the evidence shows that the Applicant has not been completely honest with the Government regarding his criminal and employment history and sought to conceal the truth. None of the mitigating factors set forth in the Directive under Guideline E apply. I find that the Applicant deliberately failed to reveal this information to the Government.

The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material aspects of his personal background. This Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline E (Personal Conduct).

The Applicant has not provided this Administrative Judge with sufficient evidence in mitigation that would negate the negative impact his falsifications have on his security worthiness. At this time, I cannot find that it is clearly consistent with the national interests to grant the Applicant a security clearance.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 4 of the SOR.

As stated above, Paragraphs 1,2 and 3 are found for the Applicant.

### **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.

Paragraph 3: For the Applicant.

Subpara. 3.a.: For the Applicant.

Paragraph 4: Against the Applicant.

Subpara. 4.a.: Against the Applicant.

Subpara. 4.b.: 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.

Darlene Lokey Anderson

Administrative Judge