

DATE: January 27, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-07444

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

While Applicant failed to reveal on his security form in 2002 that his security clearance was revoked in November 1991, his security officials advised he was only required to document the previous ten years and indeed the form specifically requires any military disciplinary record only for the past seven year. Further, he was never informed of the revocation as he was honorably discharged in October 1991. Any personal conduct concern is superseded by his subsequent long history of outstanding conduct on the job where Applicant is highly regarded for his integrity and honesty overall. He also has highly favorable references. Clearance is granted.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on April 15, 2003. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR alleges specific concerns over personal conduct (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on May 8, 2003, and requested a hearing.

The case was assigned to Department Counsel, who on July 17, 2003, attested it was ready to proceed; and the case was assigned to me on July 21, 2003. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing issued on August 5, 2003, set the matter for September 29, 2003, at a location near where Applicant works and lives. At the hearing the Government introduced four exhibits (Exhibits 1-4) which were all admitted into evidence. The Applicant represented himself, testified, called one witness, and offered two exhibits which were admitted into evidence (Exhibits A-B). The transcript (TR) was received on October 9, 2003.

**FINDINGS OF FACT**

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I

make the following Findings of Fact:

Applicant, 46 years old, has worked for Defense Contractor #1 in State #1 since July 1997 and is in a management position. Applicant served in the U.S. military from September 1976 to October 1991 when he was honorably discharged with severance pay because of a physical disability. Initially, he was granted a Defense Department Confidential clearance in July 1977. (Answer; Exhibits 1, 2; TR 25; 48-49)

Applicant attended a university in State #1 in 1997 and has a B.S. degree. He was married to Wife #1 in 1978 and divorced in 1984, married to Wife #2 in 1987 and divorced in 1998, and married to Wife #3 in October 1999. He has four children born in 1975, 1980, 1988, and 1990. He and Wife #3 have raised eight children together; they have five teenage boys at home. His current wife is in the military and has been assigned overseas. (Answer; Exhibit 1; TR 43-44)

### **Personal Conduct**

In January 2002, Applicant was advised by a company briefing that his answers on the security form need only cover the previous ten years from January 2002 back to January 1992 as he was seeking a Secret clearance. Thus, when Applicant completed and signed a Security Clearance Application (SF 86), in response to Question 32 whether "To your knowledge" he had ever had a clearance denied, suspended, or revoked, Applicant answer "No." The Government alleged he failed to disclose that his security clearance was revoked in November 1991 after a special court-martial conviction<sup>(2)</sup>

in February 1991 for larceny, a violation of Article 121, UCMJ after he stole 14 compact discs and 6 blank high intensity video tapes valued about \$200 in December 1990 when he was assigned to State #2. While Applicant admitted he had been convicted, he denied that he intentionally left this military conviction and the security clearance information off the SF 86. At the hearing he acknowledged that Question 32 said "ever," but he did not read it that way at the time he completed the form as several other questions had time limits on them and he understood from the company briefing that he only had to cover ten years. Indeed, the SF 86 form only requires any military disciplinary record for the past seven years, so he was not required to disclose the military court conviction on the SF 86. While Applicant was notified in September 1991 of the intent to revoke his security clearance based on this criminal misconduct, he did not focus on losing his clearance as there was no "big courtroom ordeal" at the time. In 1991 Applicant only focused on the court martial, not the security clearance issue. He does not remember signing the security clearance paper because the overall situation was so grave. Also, after his divorce, he did not have any copies of his military papers as his former wife took them. Furthermore, although his clearance was revoked in November 1991, he never received the November 1991 letter that revoked his security clearance as he was no longer in the military having been honorably discharged in October 1991 because of a physical disability. The first time he saw the clearance revocation (Exhibit 4) was when Department Counsel sent it to him. Thus, I conclude Applicant had no intent to conceal. (Answer; Exhibits 1, 2, 3, 4; TR 14-18, 22-23; 26-39; 45-48)

Applicant has never been accused of misconduct at his work place with Defense Contractor #1. (TR 41-42)

### **References**

Applicant's manager at Defense Contractor #1, who has known him for six years, recommended him as "a man of great integrity and honesty." He is well respected by his superiors and peers and has at all times been very dependable, reliable, and honest. He has received various awards and letters in recognition of his professionalism and leadership from Defense Contractor #1. (Exhibit A; TR 25; 39-40)

An employee who has a Secret clearance and has known Applicant at Defense Contractor #1 for two years testified that Applicant is a person with integrity. Applicant supervised him for one year. (TR 53-63)

A manager at a store where Applicant shops stated that Applicant is a man of honesty and good character. The manager cited as examples that two years ago Applicant returned to the store when he discovered he had been given two bicycles and not been charged for them. Applicant also discovered a wallet in the parking lot with \$100 in it which he turned into this manager. (Exhibit B; TR 25-26; 40-41)

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

### **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 person may not properly safeguard classified information.**

**Conditions that could raise a security concern and may be disqualifying also include:**

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 include:**

5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## CONCLUSIONS

### **Personal Conduct**

Applicant rebutted the Government's security concerns over personal conduct issues over his failure to disclose his 1991 military security clearance revocation in answering question 32 on his 2002 security form as he had no intent to falsify. Applicant was advised by his company that he only had to document the previous ten years on his form. Indeed, the SF 86 form only requires any military disciplinary record for the past seven years, so he was not required to disclose the 1991 military court conviction on the SF 86. In addition, while he clearly remembered being restricted from the base exchange after his 1991 conviction, he rebutted and overcome the Government's allegations by establishing also that, in fact, he was never formally advised of the November 1991 revocation by the military as he was honorably discharged in October 1991 on a medical disability.

Further, even if one were to conclude he had a duty to investigate and inform himself about this 1991 incident, he mitigated<sup>(3)</sup> this concern under MC 5, as he has subsequently taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. He has not subsequently had any subsequent adverse incidents. Further, his subsequent conduct on the job is so well regarded as to lead to the conclusion that his one instance of military misconduct in 1991 was an isolated incident of poor judgment. His current good work record and his highly favorable reference letters outweigh any personal conduct concern. For example, Applicant's manager considers Applicant a "man of great integrity and honesty."

Consequently, I conclude that Applicant had no intent to falsify or misrepresent his background by his "No" answer to Question 32 on the security clearance form. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. through 1.a (1) under SOR Paragraph 1.

### FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.a.(1).: For Applicant

### DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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Kathryn Moen Braeman

Administrative Judge

1.

2. Applicant said his conduct was isolated. He only took the base exchange property because he was angry over his treatment after he had designed a ring for the base exchange and had not been properly compensated for his design. The military judge did not send him to jail; he was only restricted to the barracks for 30 days, forfeited two months pay, was reduced in rank, and sent back to work. At the time of his court martial, he remembers signing "a zillion things." He does not remember his access being suspended in March 1991; he only remembers that his access to the base exchange was restricted because of his shoplifting there.

**3. Conditions that could mitigate security concerns include:** 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.