

DATE: March 22, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-08487

**DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

**APPEARANCES**

**FOR GOVERNMENT**

Catherine Engstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 57-year-old employee of a defense contractor. He admitted to a conviction for assault and indecent exposure in a public restroom six years ago and failing to report the incident on his Application for Security Clearance (SF 86) and in two sworn statements to an investigator. Clearance is denied.

**STATEMENT OF CASE**

On April 15, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Information Within Industry*, 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, issued a Statement of Reasons (SOR) to 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 Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement dated May 12, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on November 3, 2003. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not respond and the case was assigned to me on January 15, 2004.

**FINDINGS OF FACT**

Applicant admitted to all of the specific facts alleged in the SOR. The admitted facts are hereby incorporated as findings of fact.

After a complete and thorough review of the information in the record, and upon due consideration of same, I make the

following additional findings of fact:

Applicant is a 57-year-old employee of a defense contractor. He admitted to a conviction for assault and indecent exposure in a public restroom six years ago and failing to report the incident on his Application for Security Clearance (SF 86) and in two sworn statements to an investigator.

### 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.

An evaluation of whether the applicant meets the security guidelines includes consideration of 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; and (9) the likelihood of continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR.

Applicant's conviction for assault and indecent exposure raises issues under Guideline D involving sexual behavior of a criminal nature (E2.A4.1.2.1.), that causes an individual to be vulnerable to coercion, exploitation or duress (E2.A4.1.2.3.), and of a public nature that reflects lack of discretion or judgment (E2.A4.1.2.4.).

Also alleged is failing to disclose his prior conviction on his SF 86 and in two sworn statements to an investigator. Guideline E raises an issue involving questionable judgment, unreliability, and unwillingness to comply with rules and regulations that could indicate the person may not properly safeguard classified information (E2.A5.1.1.). Also included is a deliberate omission of relevant and material facts from a personnel security application (E2.A5.1.2.2.), and providing false information on relevant and material matters to an investigator in connection with a security investigation (E2.A5.1.2.3.).

Applicant has acknowledged his conviction but states that he is not subject to exploitation because his wife is aware of the incident. Even though his wife may be aware of the incident, the fact that he failed to report the incident on his SF 86 indicates a fear of it's being revealed. Although the incident occurred six years ago, the gravity of the incident combined with his failure to report it indicates a finding against the Applicant under Guideline D. No mitigating factors are applicable.

Applicant failed to report the conviction on his SF 86 and to an investigator who questioned him about his apparent failure to do so. No mitigating factors under Guideline E are applicable.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that it is not clearly consistent with the national interest to grant clearance to Applicant.

### **FORMAL FINDINGS**

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline D: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

### **DECISION**

After full consideration of all the facts and documents 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. Clearance is denied.

Charles D. Ablard

Administrative Judge