

DATE: October 19, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-28194

**DECISION OF ADMINISTRATIVE JUDGE**

**THOMAS M. CREAN**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 50-year-old retired Navy sailor working as a quality assurance technician for a defense contractor. He deliberately failed to list an arrest for attempted sexual battery during an alcohol related incident on his security clearance application. Clearance is denied.

**STATEMENT OF THE CASE**

On February 9, 2004, The Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on February 13, 2004. The SOR alleges security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive.

Applicant answered the SOR in writing on March 2, 2004. Applicant elected to have the matter decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on August 19, 2004. Applicant received a complete file of relevant material (FORM) on August 30, 2004. Applicant was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. His response was due October 1, 2004. As of October 5, 2004, he had not responded. The case was assigned to me on October 12, 2004.

**FINDINGS OF FACT**

Applicant is a 50-year-old quality control technician for a defense contractor. He retired from the Navy after 20 years of service. He started drinking at age 14. He was a heavy drinker in the Navy and for a few years after retirement from the Navy. On June 20, 1998, while intoxicated, Applicant entered his step-daughter's room only partially clothed and laid down next to her on the bed. The step-daughter left the room by crawling out the window and went to a neighbor's

house. Applicant was arrested and charged with attempted sexual battery, a felony. Applicant was found guilty of simple assault, a misdemeanor, on August 14, 2004. He was sentenced on November 20, 1998, and ordered to complete counseling, have only supervised visits with his children, and pay court costs. He was not sentenced to confinement. In the time between his arrest and the sentencing, the Applicant was treated for alcohol dependency at a residential treatment facility and completed the alcohol dependency program.

Applicant submitted his security clearance application on June 7, 2001. (FORM, Item 4). Question 24 asked the following:

### **Your Police Record - Alcohol or Drug Offenses**

Have you ever been charged with or convicted of an offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed " or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substance Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Question 26 of the security clearance application asked:

### **Your Police Record - Other Offenses**

In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record.

Applicant answered "No" to both questions. He did not report his arrest on June 20, 1998, for attempted sexual battery, which happened when he was intoxicated and that required him to receive medical assistance and counseling for alcohol.

Applicant provided a statement to a Special Agent of the Defense Security Service on July 30, 2002, concerning his arrest on June 20, 1998. Applicant stated in regard to his arrest that:

"During my Alcoholism I was arrested for a misdemeanor 20 June 1998. I did not mention before either because it ask for felony charges or I was just scared. I have never been arrested for, nor charged with a felony. I was offered a chance to go to Alcohol rehab and I went. Arrest took place in my own home. No vilonce (sp) nor was it a driving offense. My ex had had enough. I made her sick as an alcoholic and she got rid of the problem. Me. I was a couch drunk..."

Applicant successfully completed an alcohol rehabilitation program. He has been "sober" for six years.

## **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 judgement, 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person

concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

### CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Under Guideline E (Personal Conduct (PC)), a security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, *lack of candor*, *dishonesty*, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information. E2.A5.1.1.

Applicant's answers to questions on his 2001 security clearance application brings this matter within Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*the deliberate omission, concealment, or falsification of relevant and material facts from the personnel security questionnaire*). Applicant did not report his arrest for attempted sexual battery while intoxicated in response to both questions 24 and 26. Applicant stated he did not include the arrest because he thought his arrest was for a misdemeanor and he did not have to report misdemeanors. Felony charges or convictions are covered in response to question 21. Questions 24 is clear and straight forward in requesting information on any charges or convictions, not just felonies, related to alcohol. Questions 26 is clear and straight forward requesting information on any charge or conviction, not just felonies, in the last 7 years not listed in response to question "...24...". Applicant was clearly on notice that in his answer to either question 24 or 26 he had to list his arrest for attempted sexual battery even if he thought it was only a misdemeanor. When Applicant did not list the offense in response to either question, he provided false information to both questions. The reason he did not include the information on the arrest in response to either question 24 or 26 was because, as he stated in his response to the DSS agent on July 30, 2002 (Form, Gov. Ex. 5), "he was scared." I conclude Applicant's failure to note his arrest for attempted sexual battery is a lack of candor and deliberate omission or concealment within the meaning of guideline E.

The Personal Conduct Mitigating Conditions (PC MC) that may be relevant to this Applicant are E2.A5.1.3.1. (*the information was...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*); and E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*). The information on the arrest was relevant and pertinent to a determination of Applicant's judgment, trustworthiness, or reliability. The falsification on Applicant's recent security clearance application was embellished in his statement to the DSS agent. Applicant did not make any effort to correct his error but continues to insist he did not have to list the offense because it was a misdemeanor. I conclude there are no mitigating conditions under Guideline E established by the Applicant.

Under Guideline J, (Criminal Conduct (CC)), criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's reliability and trustworthiness. E2.A10.1.1. Applicant's knowing, deliberate, and willful omission of the arrest for attempted sexual battery on the security clearance application is a felony violation of Title 18, United States Code, Section 1001, and thus a serious crime. This conduct raises a security concern under the Criminal Conduct Disqualifying Conditions (CC DC) E2.A10.1.2.2. (*allegation or admission of criminal conduct, regardless of whether the person was formally charged*); and E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses.*) Applicant swore to the truth of his security clearance application under penalty of law. When he knowingly did not provide true answers to questions 24 and 26, he violated 18 U.S.C. 1001. This offense goes to the heart of trustworthiness that is an important trait required for ensuring our national security.

The Criminal Conduct Mitigating Conditions (CC MC) E2.A10.1.3.1 (*the crime was an isolated incident*); and E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*) do not apply. The false statement was not isolated because Applicant provided the false information on both the security clearance application and in his July 30, 2002, statement to the DSS special agent. There is no evidence of rehabilitation to his providing false information. I conclude there are no mitigating conditions established by Applicant.

The SOR alleges Applicant's statement of July 20, 2002, to the DSS Special Agent was false because he stated he was arrested on June 29, 1998, for drunk and disorderly during a verbal dispute with his common law wife rather than for attempted sexual battery. The interpretation in the SOR of Applicant's statement is a far stretch of what he actually stated. In no part of the statement did Applicant say he was only arrested for drunk and disorderly conduct during a verbal altercation with his common law wife. He does say the incident took place during his alcoholism and that his wife had enough of him and she got rid of her problem. This was not a deliberate omission or misstatement of the facts by Applicant. The evidence does not support Applicant lied to the DSS agent on July 30, 2002.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

### **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. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

Thomas M. Crean  
Administrative Judge