

DATE: February 24, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-28330

## **DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Juan Rivera, Esquire, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of criminal conduct, which most recently includes domestic violence and violation of court orders. He also omitted from his October 2001 SF-86 relevant and material information about his arrests and about his involuntary termination from his last employer. He has not mitigated the security significance of his falsifications or his criminal conduct, and is disqualified under Guideline E and Guideline J. Accordingly, his request for clearance is denied.

### **STATEMENT OF THE CASE**

On April 21, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. [\(U\)](#) The SOR alleges facts that raise security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

On June 6, 2003, Applicant submitted a notarized response to the SOR (Answer), wherein he admitted the allegations in SOR paragraph 1, denied the allegations in SOR paragraph 2, and requested a hearing. The case was originally assigned to a different administrative judge, but was re-assigned to me on October 16, 2003. On October 20, 2003, DOHA issued a Notice of Hearing setting this case to be heard on November 14, 2003. All parties appeared as scheduled. The government submitted 13 exhibits (Ex. 1 - 13) and relied on Applicant's testimony as an adverse witness. Applicant submitted 14 exhibits (Ex. A - N) and testified in his own behalf. DOHA received the transcript (Tr) on December 1, 2003.

### **FINDINGS OF FACT**

In his Answer, Applicant admitted (with explanation) the allegations in SOR paragraph 1, and I have incorporated those admissions into this decision. After a thorough review of the pleadings, transcript, and exhibits, I make the following

additional findings of fact:

Applicant is a 47-year-old local area network (LAN) information technology manager employed by a defense contractor. He seeks a security clearance required as part of his assigned duties, but he had previously held a top secret clearance while a uniformed service member of the U.S. Army.

Applicant's early years were marked by domestic instability and a general lack of structure. He is one of eight children raised without a father. He found himself in trouble several times as a teenager, yet his mother was unable or unwilling to help him and she eventually kicked him out of the house when he was 16 years old.<sup>(2)</sup> It was around this time he was arrested for the first time and charged with shoplifting. Two months later he was arrested for forgery. Five months after that, he was arrested for violating the terms of his probation and sentenced to 30 days in jail.

In January 1981, at age 24, Applicant joined the Army where he served until July 1987, when he was administratively discharged for misconduct albeit under honorable conditions. His discharge came about after he had been arrested twice in March 1986.<sup>(3)</sup> Applicant elected to accept an administrative discharge under honorable conditions rather than face a court martial.<sup>(4)</sup> In November 1987, the Army referred the adverse information about his arrests to the USA CCF for review of Applicant's continued suitability for a security clearance; however, because he had already left the service and his clearance had been administratively terminated, USA CCF took no further action.<sup>(5)</sup>

Applicant has been married four times and all four marriages ended in divorce. He also has two daughters, both now in their 20's, neither of whom is the product of his marriages. Applicant raised one of his daughters and the other was raised by her mother. Applicant's first two marriages are unremarkable for security significant information. Applicant's third marriage, in 1985 to another Army enlisted member, ended in divorce in either 1987 or 1988. During this marriage, in March 1986, Applicant had two physical altercations with his wife. In the course of one such incident, he injured his own daughter when he tried to grab her arm to get her out of his wife's car. He was charged with disorderly conduct (domestic) and damage to private property after the first incident on March 10, 1987. He was charged with assault after the second incident on March 31, 1987.<sup>(6)</sup>

Applicant was married a fourth time between May 1996 and June 1997. On June 13, 1997, at or around the time Applicant's divorce was made final, he assaulted his ex-wife when he pushed past her to get into her house then stole a day planner and credit cards from her. He also acted in a menacing fashion and made threatening statements to her when he showed up uninvited at the house where she and her three young children (from a previous marriage) lived after she and Applicant had separated. Applicant was arrested and charged with petty theft and assault. In February 1998, he was acquitted of the assault charge, but adjudication of guilt was withheld as to the theft charge and he was placed on six months probation.<sup>(7)</sup>

Three days later, Applicant's ex-wife petitioned for an injunction for protection from domestic violence by the Applicant. She was granted a temporary injunction pending a full hearing in Applicant's presence; however, Applicant violated the temporary injunction on June 22, 1997 by going to his ex-wife's church, a place he knew her to frequent.<sup>(8)</sup> On July 10, 1997, after a hearing on the aforementioned petition for injunction, the court issued a permanent injunction whereby Applicant was ordered to have no contact of any kind with his ex-wife for one year.<sup>(9)</sup> He was subsequently arrested and charged with violating this injunction on January 5, 1998 after he contacted with his ex-wife in writing. On July 2, 1998, he was found guilty of violating the injunction and was placed on 12 months probation. On July 10, 1998, Applicant's ex-wife again petitioned for an injunction against domestic violence by Applicant. On July 17, 1998, the court issued another injunction barring Applicant from any contact with his ex-wife and her children until July 23, 1999. Applicant was released from the injunction and from his probation in July 1999.<sup>(10)</sup>

Applicant has attempted to minimize the severity of his conduct in March 1986 by claiming that one of his arrests came after he caught his wife having an affair; however, there is no mention of these circumstances anywhere in the reports and documents generated at or near the time of the incidents. If anything, the military police reports reflect a concern about whether Applicant was abusing his daughter, and recount his hostile, violent reactions to his third wife's attempts to protect his daughter as well as her own child.<sup>(11)</sup>

Applicant has also implied he was not forced out of the Army due to misconduct and that he sought an administrative discharge because he was concerned about his daughter's welfare.<sup>(12)</sup> However, when I questioned Applicant about the circumstances surrounding his discharge, he admitted he elected to accept an administrative discharge rather than face a court martial on the charges against him.<sup>(13)</sup>

Applicant has worked for his current employer as a LAN manager since October 2001. After leaving the Army, he worked for the same company until October 1991, but in a different capacity and at different work sites. During the intervening 10 years, Applicant worked in a variety of technical positions for eight different employers.

On October 31, 2001, Applicant submitted an SF-86 to obtain a clearance he requires for his current job. In response to question 6 regarding his history of employment, Applicant listed erroneous dates of employment for two companies where he worked between April 1999 and May 2001.<sup>(14)</sup> Applicant asserts the position he held immediately before being hired by his current employer was eliminated in May 2001, when his company was bought out by another firm. However, he stated in his Answer that he "was ashamed of listing this company because of the way they violated my human right (sic), and treated me like a third class citizen; I am still trying to put (sic) company out of my mind." In his testimony, Applicant further stated he was upset about the fact he was not continued in his position with the new employer. In response to SF-86 question 20, asking if he has ever left a job under unfavorable circumstances, Applicant did not provide any information about the circumstances of his termination from his employer in May 2001.<sup>(15)</sup> Based on Applicant's Answer and testimony, I find that his departure from the job he held immediately before his current job was at the very least involuntary, that he should have disclosed it in response to question 20, and that he deliberately falsified his response to that question as alleged in SOR subparagraph 2.b. Further, Applicant's explanations about the erroneous dates of his past employment in question 6 conflict with his explanations of how or why he left the aforementioned prior job. For example, in his Answer, Applicant asserts he quit the same job that he has also claimed was eliminated when his company changed hands. Such conflicting statements seriously undermine Applicant's credibility. I find that he deliberately falsified his answer to question 6 as alleged in SOR subparagraph 2.a.

In response to SF-86 question 26, which addresses criminal conduct in the past seven years not listed elsewhere in the questionnaire, Applicant deliberately omitted the fact he was twice charged (June 1997 and July 1998) with violating court orders for him to have no contact with his fourth wife, or his arrest in June 1997 for petit theft and assault. Applicant disclosed this information to an agent of the Defense Security Service (DSS) during a subject interview in April 2002. Despite his claim that he also disclosed adverse employment information to the same DSS agent, the written statement he gave to DSS does not contain any such information.<sup>(16)</sup>

Applicant is well-regarded by several people who have known him over the years, particularly in the last two-to-four years. The multiple letters of reference and support Applicant submitted also show he was a solid and reliable soldier.<sup>(17)</sup>

On October 1, 2003, Applicant met with a local family counseling center. Ostensibly, his reason for doing so was to show that he was not prone to domestic violence. However, it does not appear he engaged in any substantive treatment nor did he receive a diagnosis or other assessment that would be useful in this proceeding.<sup>(18)</sup>

## **POLICIES**

The Directive sets forth adjudicative guidelines<sup>(19)</sup> to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

## **BURDEN OF PROOF**

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(20)</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.<sup>(21)</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.<sup>(22)</sup>

## **CONCLUSIONS**

**Guideline E (Personal Conduct).** Under this guideline, conduct involving questionable judgment, untrustworthiness, unreliability, dishonesty, or unwillingness to comply with rules and regulations indicate that the person may not properly safeguard classified information.<sup>(23)</sup> Here the government's allegations in SOR paragraph 2, if proved, would significantly undermine the government's confidence in Applicant's honesty, a fundamental facet of the personnel security program. The government has established that Applicant deliberately omitted his three arrests or criminal charges in 1997 and 1998 from the SF-86 he signed and submitted in October 2001. The government has also established that Applicant deliberately provided misleading information about his employment history when he answered SF-86 question 6, and that he deliberately omitted relevant information about his termination from a previous job by answering "no" to question 20. Guideline E disqualifying condition (DC) 2<sup>(24)</sup> applies here.

By contrast, Applicant's only explanation for omitting his arrests is that he subsequently disclosed his arrests to a DSS agent. Applicant's position, if supported by the record, might require application of Guideline E mitigating condition (MC) 3.<sup>(25)</sup> However, Applicant did not make a prompt effort to correct the falsification because nearly six months passed between his SF-86 submission and his subject interview. Without a showing that his disclosures were made promptly, his disclosures can not be characterized as being made in good faith. Further, after hearing Applicant's testimony, reviewing his signed, sworn statement to DSS, and comparing this information to records generated at or near the time of his arrests, I conclude he is still trying to minimize the import of his conduct and skew the circumstances of his criminal conduct.

As for his answers to SF-86 questions 6 and 20, he has provided conflicting explanations about his reasons for providing those answers, but he also admitted that he was ashamed of disclosing his termination from his previous employer in response to question 20. While detailed information is not available in the record, it is clear that Applicant has been less than candid in answering the questions at issue. He has also asserted that he disclosed this information to the DSS agent, an assertion unsupported by the record evidence. His conflicting explanations in his Answer and his testimony about his employment history lead me to the same conclusion in that regard. Applicant was evasive and simply not credible in response to the government's queries presented in the SF-86, the subject interview, his Answer to the SOR and in his testimony at hearing. As he has presented no other information that would support application of other mitigating conditions, I conclude Guideline E against the Applicant.

**Guideline J (Criminal Conduct).** The security concern under Guideline J is that a person who is willing to disregard the law and risk possible fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information. In some cases, the criminal activity does not consist of any serious crimes, but a series of minor offenses. Additionally, it is not necessary that an Applicant actually be arrested and prosecuted for the alleged conduct, only that the information available to the Government be sufficient to show that the alleged conduct occurred. Here, except for the allegation in subparagraph 1.g,<sup>(26)</sup> the government has established that Applicant has a long history of relatively minor offenses, such as forgery, shoplifting, and passing bad checks, as well as a history of confrontational and sometimes violent behavior. He has also demonstrated a willingness to disregard court orders

imposed on him as a consequence of his behavior. Guideline J DC 1 [\(27\)](#) and DC 2 [\(28\)](#) apply.

Applicant has failed to meet his burden to refute, extenuate or mitigate the facts established by the government's information. I recognize that he has not engaged in any criminal conduct since 1998; however, when balanced against a 25-year period of criminal conduct and his continued evasiveness about the circumstances of his arrests (to include his deliberate SF-86 falsifications), doubts remain about whether his adverse conduct will be repeated. Likewise, there is no basis for application of any of the listed mitigating conditions. Accordingly, I conclude Guideline J against the Applicant.

I have carefully weighed all of the evidence in this case, and I have applied the aforementioned disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. The record evidence as a whole presents an unacceptable risk to the government's compelling interest in ensuring its classified information is properly safeguarded. Applicant's demonstrated disregard for rules and regulations, most notably his willful disobedience of two court orders, and his willingness to mislead the government about his criminal conduct and employment history indicate he cannot be relied on to meet his fiduciary obligations were he granted access to classified information.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: For the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: Against the Applicant

Subparagraph 1.j: Against the Applicant

Subparagraph 1.k: Against the Applicant

Subparagraph 1.l: Against the Applicant

Paragraph 2, Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

**DECISION**

In light of all the circumstances presented in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Ex. 2.
3. Ex. 4, Ex. 5, Ex. 6, Ex. F, Ex. G.
4. Tr., p. 86.
5. Ex. 6, Ex. J.
6. Tr., p. 78 - 80; Ex. 6.
7. Ex. 10.
8. Ex. 9.
9. Ex. 11
10. Ex. 13.
11. Ex. I.
12. Answer.
13. Tr., p. 86.
14. Ex. 1.
15. Answer; Tr., p. 38 - 43.
16. Answer; Tr., p.44, 47; Ex. 2.
17. Ex. A, Ex. B, Ex. C, and Ex. D.
18. Ex. D.
19. Directive, Enclosure 2.
20. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
21. *See Egan*, 484 U.S. at 528, 531.
22. *See Egan*; Directive E2.2.2.
23. Directive, E2.A5.1.1.
24. Directive, 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,

determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

25. Directive E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

26. As drafted, this allegation fails to allege facts or circumstances that constitute criminal conduct. It merely states that Applicant made good on a check he had issued without sufficient funds. There is no allegation that he was arrested, charged or otherwise made to answer for his conduct by any law enforcement entity. As such, Applicant's admission notwithstanding, this allegation cannot be used as a basis for disqualification under Guideline J.

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

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