

DATE: June 29, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-30013

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Nygina T. Mills, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant falsified his December 2001 security clearance application (SF-86) by deliberately omitting his 1995 and 1998 alcohol-related arrests and charges and failed to correct his omissions in a good-faith and prompt way before being interviewed by a DSS agent 17 months later. Applicant's concealment is not mitigated under any of the pertinent mitigation guidelines and raise continuing security concerns about Applicant's judgment and reliability. Applicant refutes and mitigates the falsification allegations pertaining to his suspension of his security clearance associated with his administrative discharge and his related failure to inform his spouse of the pornographic materials seized from his military quarters. Clearance is denied.

**STATEMENT OF THE CASE**

On November 14, 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 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, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on December 3, 2003, and requested a hearing. The case was initially assigned to another judge and assigned to me on May 12, 2004. The case was scheduled for hearing on May 19, 2004 and convened on the same date, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of six exhibits; Applicant relied on one witness (himself) and two exhibits. The transcript (R.T.) was received on May 27, 2004.

**SUMMARY OF PLEADINGS**

Under Guidelines E, Applicant is alleged to have falsified his security clearance application (SF-86) of December 2001 by (a) omitting two alcohol-related arrests of December 1995 and May 1998 on a military reservation, respectively, and a security clearance suspension by his Army command (based on a finding of applicant possession of pornographic material) in November 1998, Under Guideline J, the same allegations are incorporated under 10 U.S.C. Sec. 1001.

For his answer to the SOR, Applicant admitted each of his SF-86 omissions but denied failing to tell his spouse of his security clearance suspension by his Army command. In explanation, he claimed to have been advised at the time of his DuI arrests that these offenses would not be on any permanent record that would follow him. Because both alcohol incidents were handled at Battalion level, Applicant claimed these incidents had no relevance to the police record question in his SF-86. Addressing his security clearance suspension allegation, he claimed no awareness of the suspension at the time he completed his SF-86 in December 2001 and subsequent disclosure of the circumstances giving rise to his clearance suspension to his spouse.

### **FINDINGS OF FACTS**

Applicant is a 30-year-old satellite technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Between November 1995 and December 1998 Applicant was on active duty with the US Army. During this period he was involved in two alcohol-related incidents: one December 1995 and the other in May 1998.

In 1995 Applicant was stopped by police on suspicion of a traffic infraction and then administered a field sobriety test. After registering a .08 per cent BAC, he was arrested and later charged with DuI, driving with a suspended license, no proof of insurance, no seat belt and no post decal. Applicant pleaded guilty to DuI before his commanding officer and received Article 15 non-judicial punishment. His punishment comprised 45 days of extra duty, 45 days restriction, alcohol counseling and forfeiture of \$408.00 per month for 2 months.

While still on active military duty, Applicant was stopped once again by military police in May 1998 and administered a field sobriety test. After receiving confirmation that he had failed the test, he was arrested by investigating police and charged with operating a vehicle with a blood-alcohol content of .084 per cent or higher (*see* exs. 2 and 6). The following day Applicant reported his arrest to his local military commander. After being informed of his legal rights (which he waived) he provided a sworn statement in which he admitted the alcohol-related offense. Applicant was then charged with DuI, for which he accepted Article 15 non-judicial punishment: reduction in rank and ordered attendance of alcohol counseling.

During a room inspection of his quarters in October 1998, military inspectors found three magazines containing male pornographic materials, a gay community newspaper and five pornographic photos depicting Applicant and another male soldier performing sexual acts. All of these materials were confiscated by the inspectors. Based on these findings, Applicant's commanding officer recommended suspension of his security clearance. In November 1998, Applicant was administratively separated from the Army. As a part of his separation, his security clearance was suspended.

While Applicant did not immediately notify his wife of the materials that were found in his quarters in October 1998, resulting in his administrative separation, he has since told her about the materials (*see* ex. B).

When asked to complete his SF-86 in December 2001, Applicant omitted both his alcohol-related arrests of 1995 and 1998, respectively, from his answers to questions 24 (alcohol-related offenses) and question 25 (military court proceedings). He attributes his omissions to advice he received back when the incidents occurred that the arrests would not be reported to civilian authorities and hence would not be relevant to any clearance investigation pertaining to a civilian assignment. Both relevance and his stated belief that Article 15 punishment did not constitute non-judicial punishment and hence was not covered by questions 24 and 25 constitute Applicant's principal rationale for omitting these arrests (R.T., at 25-26, 45-47). Applicant also insists he had no reason to conceal these arrests, since his military records would likely be available to federal investigators anyway.

Applicant made no cognizable effort to seek contemporaneous advice about the meaning of question 24 in his SF-86.

His explanations for omitting his two alcohol-related offenses fail to manifest any Applicant confusion about the information called for in questions 24 and 25. His attributed reasons for omitting his arrests reflect more the desire by Applicant to want to conceal as much adverse information about himself that he could reasonably count on being overlooked by any security clearance investigator. Applicant's explanations for omitting his alcohol-related arrests and non-judicial punishment do not enable him to avert drawn inferences his omissions were knowing and wilful.

Besides his alcohol-related arrests, Applicant also omitted his 1998 security clearance suspension when completing his 2001 SF-86. He attributes his omission of this information from his answer to question 32 to his lack of knowledge of losing his security clearance in connection with his 1998 administrative separation (R.T., at 28-29, 49-50). He assures he was simply not aware that his clearance had been suspended when he completed his 2001 SF-86. This explanation, though, is a little bit different from the one he provided in his April 2003 DSS statement. In his signed, sworn statement he said only that he did not find enough space in the SF-86 to disclose photograph information: He said nothing about lack of knowledge that his clearance suspension was part of his administrative separation (*see ex. 2*).

While it is reasonable to question Applicant's claims he did not associate his administrative separation under honorable conditions with implicit suspension of his security clearance, doubts alone about his explanations are not enough to impute knowing and wilful omission. There is nothing in any of Applicant's administrative separation papers (exs. 3 and 4) to indicate Applicant was notified of any intended suspension of his security clearance. His separation notice of November 1998 advises him only of his recommended discharge and entitlement to consult with counsel about it, submit written statements in his behalf, and obtain copies of pertinent documents. His discharge notice recites that he will receive an honorable discharge through administrative separation but nothing about a clearance suspension (ex. 4). Considering all of the circumstances surrounding his omission of his clearance suspension in his answer to question 32 of his SF-86 are accepted.

Applicant provided explanations for omitting his alcohol-related arrests when interviewed by a DSS agent 17 months later (in April 2003). It is not clear from either his signed, written statement whether he provided the information voluntarily or was confronted with the arrest reports. Because any prompt, good faith disclosures require the claiming applicant to carry his or her evidentiary burden of showing his disclosures were prompt and voluntary, Applicant's failure to demonstrate either requirement precludes any favorable finding of prompt, good faith disclosure of the subject arrests.

Applicant has received favorable character references from his company chairman and facility clearance officer. Both credit him with good standing in the company and excellent dependability and trust. Military customers who interface with him also credit him with trustworthiness (*see ex. A*).

### **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These revised Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

#### **Personal Conduct**

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

#### **Disqualifying Conditions:**

DC 2 DC 2 The deliberate omission, concealment, falsification or misrepresentation 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.

**Mitigating Conditions:**

MC 2 The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

MC 3 The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

**Criminal Conduct**

*The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

**Disqualifying Conditions:**

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

**Mitigating Conditions:**

MC 1 The criminal behavior was not recent.

MC 6 There is clear evidence of successful rehabilitation.

**Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

Government's case.

**CONCLUSIONS**

Applicant has a good work record. He also has a record of security significant omissions in his December 2001 SF-86 of

prior alcohol-related arrests and charges in 1995 and 1998, respectively. These omissions raise security concerns over whether he possesses the requisite judgment, reliability and trustworthiness for eligibility to access classified information.

### **Falsification issues**

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's alcohol-related arrest omissions when responding to questions 24 and 25 of the SF-86 he executed in December 2001. So much trust is imposed on persons cleared to see classified information that deviation tolerances for incidents of trust betrayal are calibrated narrowly.

By omitting his 1995 and 1998 arrests from his answers to questions 24 and 25, Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His claims of some confusion over the questions were resolved factually against him and preclude him from averting deliberate falsification inferences. Applicant's expressed reliance on prior advice his arrests/charges would not be reported in any civilian records provides no acceptable excuse for omitting them from his SF-86. His omissions, as such, were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of Disqualifying Conditions (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire). Only with respect to his omission of his later clearance suspension and initial failure to inform his wife of the pornographic materials seized from his quarters is Applicant able to successfully refute concealment allegations

Applicant failed to take advantage of earlier opportunities to correct his earlier SF-86 omissions before disclosing his prior alcohol-related arrests in a DSS interview conducted 17 months later. His disclosures were neither prompt nor manifestly made without prompting. Not only has our Appeal Board found the use of Mitigating Condition (MC) 2 of the Adjudicative Guidelines for personal conduct (isolated, corrected falsification) to be unavailable to applicants seeking mitigation by treating the omission as isolated, but it has denied applicants availability of MC 3 (prompt, good-faith disclosure) as well in circumstances (as here) where the applicant has failed to volunteer the adverse information in a prompt fashion. *Compare* ISCR Case No. 02-23365 (March 22, 2004) and ISCR Case No. 97-0289 (January 1998) with DISCR Case No. 93-1390 (January 1995). Applicant, accordingly, may not take advantage of either C 2 (isolated omissions) or MC 3 (prompt, good faith correction of the falsification).

There can be no doubt but that Applicant has inspired confidence and trust among his defense contractor supervisors. But in the face of his SF-86 omissions, his favorable character evidence alone is not enough to mitigate security concerns over his failure to be truthful in his SF-86 submission. The Government must be able to repose a high degree of trust in persons it grants access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Applicant's falsification of his security clearance raises security concerns about his judgment, reliability and trustworthiness that prevent him from mitigating the Government's security concerns at this time. Extenuated and mitigated is his initial failure to disclose the seizure of pornographic materials from his military quarters in October 1998. Applicant persuades he has since told his wife about the seized materials and resulting administrative separation.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to subparagraph 1.a of Guideline E, but not as to subparagraphs 1.b and 1.c.

### **Criminal coverage of underlying acts and falsification issues**

That none of Applicant's SF-86 omissions resulted in any adverse convictions against Applicant does not mean the falsification issues may not be raised and considered anew in a clearance proceeding such as the present. Our Appeal Board has repeatedly stated that the Government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). The 2001 SF-86 Applicant completed does not limit the type of proceedings in which charges emanate from (question 24) and in the ensuing question (question 25) explicitly includes non-judicial punishment (which Article 15 issuance certainly is) as covered proceedings. Taken together, questions 24 and 25 make manifestly clear that alcohol-related offenses from any venue source are of interest to the Government and should be properly disclosed when answering one or both questions. Accordingly, two of the disqualifying conditions of the Adjudication Guidelines for criminal conduct may be invoked:

DC 1 (criminal conduct regardless of whether the person was formally charged) and DC 2 (a single serious crime or multiple lesser offenses).

Unlike Guideline E, which covers omissions and the absence or not of timely, voluntary corrections, Guideline J is designed to afford more recognition to an applicant's overall judgment and reliability history. Still, an applicant must meet the requirements of at least some of the mitigation conditions if he is to successfully mitigate both the underlying offenses and related falsification parameters under 18 U.S.C. Section 1001. While Applicant's underlying conduct and omissions reflect some pattern of judgment lapses they do not reflect any pattern of dishonesty. When considered in connection with his meritorious work record, his efforts warrant consideration of two of the mitigating conditions of the Adjudicative Guidelines for criminal conduct: MC 2 (isolated) and MC 6 (clear evidence of successful rehabilitation) and overall mitigation of the criminal implications of his actions. Favorable conclusions warrant, accordingly, with respect to subparagraph 2.a of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

**GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT**

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

**GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT**

Sub-para. 2.a: FOR 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge