

DATE: November 14, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-30941

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Juan J. Rivera, Esq., Department Counsel

**FOR APPLICANT**

Philip F. Lupo, Esq.

**SYNOPSIS**

Applicant was terminated in 1997 from employment as a corrections officer with a sheriff's department for violating numerous department regulations, including compromising a criminal case and associating with criminals and unsavory characters. He is unable to mitigate the security concern caused by his personal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On April 30, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(U\)](#) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline E (personal conduct) based upon Applicant's conduct while employed as a corrections officer with a sheriff's department that resulted in him being fired. Applicant submitted an answer to the SOR on May 20, 2003, partially admitted the allegations contained in the SOR, and requested a hearing.

The case was assigned to me on August 14, 2003. A notice of hearing was issued on August 19, 2003, scheduling the hearing for September 5, 2003. The hearing was conducted as scheduled. The government submitted three documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-3 and admitted into the record without an objection. The Applicant testified at the hearing, called two witnesses to testify on his behalf, and submitted fourteen documentary exhibits that were marked as Applicant Exhibit (AE) A-N and admitted into the record without an objection. Department Counsel initially objected to AE N on the basis of relevancy and completeness, but withdrew the objection after Applicant submitted the entire document. The transcript was received on September 17, 2003.

**FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits and testimony, I make the following findings of fact:

Applicant is 34 years old and has never been married. He has two children, ages thirteen and ten, who live near him in the custody of their mother, and for whom he provides support and sees on a frequent basis. He graduated high school in 1988, enlisted in the U.S. Army on July 14, 1988, and served on active duty until March 5, 1992 when he was honorably discharged, having attained the rank of Specialist 4. He resides with his father in the same house that he has lived in his entire life, with the exception of the time he served in the Army.

Applicant was hired by a sheriff's department as a corrections auxiliary officer on May 25, 1992, graduated from the basic corrections academy on June 17, 1994, and was certified as a corrections officer on August 3, 1994. In addition to his duties as a corrections officer, Applicant was assigned as a member of the Corrections Response Team. He was promoted to the rank of corporal on June 13, 1997. Applicant received a number of awards and commendations for his service to the department, and was rated as a competent and effective corrections officer.

An internal investigation was conducted in 1997 by the sheriff's department that employed Applicant based upon allegations that he was associating with criminals and unsavory characters.<sup>(2)</sup> The allegations arose from reports made by a number of police officers that they had observed Applicant in the company of known criminals. The investigation documented eleven occasions in March 1997 when Applicant was seen at various locations, including a tavern, in the company of one of three different known criminals. The investigative report, dated June 10, 1997,<sup>(3)</sup> concluded that the individuals were a cousin and two childhood friends of Applicant, that his association with those persons had not affected his job performance or the interests of the department, and that each of the charges was "Not Sustained."

A second internal investigation concerning Applicant's conduct as a corrections officer was initiated on or about June 19, 1997.<sup>(4)</sup> The allegations that caused this investigation originated from law enforcement officers who had been engaged in a large scale narcotics investigation involving local, state, and federal police agencies. During the course of that investigation two men were arrested and housed in the jail where Applicant was employed as a corrections officer. One of those arrested was cooperating with law enforcement officers, and had agreed to testify against the second arrestee. These two prisoners were ordered to be held separate within the jail.

Applicant escorted the cooperating prisoner from his cell to an interview room where he met with a law enforcement officer. Following this assignment, Applicant on at least two occasions passed notes from the non-cooperating prisoner to the one who had been interviewed by police and was cooperating with them. The tenor of both notes was to strongly discourage further cooperation.<sup>(5)</sup> Applicant admitted passing the notes, but denied knowing there was a "keep separate" order in effect or the contents of the notes. His testimony on both these issues is not credible.

The internal investigation also partially revisited the issues that had been considered in the June 10, 1997 report of investigation. Specifically, the second investigation again focused on Applicant frequenting the same tavern that was mentioned in the first investigation, with the additional allegation that he was aware marijuana was being openly used in the establishment. Applicant admitted frequenting the tavern and smelling marijuana being smoked while he was present therein.

The investigation concluded that in passing the notes between the two inmates Applicant had violated various department regulations, namely: engaging in prohibited conduct, failing to comply with laws and regulations, compromising criminal cases, and assisting criminals. It also concluded he had violated additional regulations by frequenting the tavern in question, namely: associating with criminals and unsavory characters and failure to report criminal information. The sheriff's office conducted a pre-deprivation hearing based upon the findings contained in the investigation and terminated Applicant's employment with the department. Applicant's petition to the civil service board seeking to have his termination reversed was filed out of time and was therefore not considered.

Applicant was unemployed for approximately one year following the termination of his employment with the sheriff's office. He thereafter held two jobs as a driver until he began his current employment as a security police officer on October 22, 2001. Applicant has not associated with persons engaged in criminal activity since at least 1999.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chiefs among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, with its respective DC and MC, is most relevant in this case.

### **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(6)</sup> The government has the burden of proving controverted facts.<sup>(7)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(8)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(9)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(10)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(11)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(12)</sup>

No one has a right to a security clearance<sup>(13)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(14)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(15)</sup>

### **CONCLUSIONS**

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

The severity of the misconduct that resulted in the termination of applicant's employment as a corrections officer cannot be overstated. A high degree of trust was placed in him, not only to secure jail inmates, but to also assure that the law enforcement and prosecutorial functions of the criminal justice system were not compromised by the actions of those inmates. In passing notes to an inmate that were clearly drafted in an effort to dissuade that inmate from cooperating with police and prosecutors he emphatically demonstrated he is not a person who can be trusted. By associating with known criminals while he was employed as a corrections officer, even if those criminals were boyhood friends and a cousin, and frequenting a tavern where criminal laws were being violated by the open use of a controlled substance he at a minimum exhibited extremely poor judgment.

Disqualifying Conditions (DC) 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; and DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*; and DC 6: *Association with persons involved in criminal activity* apply in this case.

Applicant attempts to minimize his conduct through his testimony, and the testimony of the witnesses he called on his behalf, to the effect that passing notes, magazines, commissary, etc. between inmates by corrections officers was common practice. However, evidence that others were violating the rules, regulations, and laws that are intended to safeguard the functioning of the criminal justice system and jail-inmates hardly can be considered mitigation. If anything, the actions of those other individuals imposed upon Applicant a duty to report their misconduct, which he failed to perform. Further, Applicant's actions in passing notes between inmates who were segregated because one had agreed to cooperate in the prosecution of the other is enormously more egregious than the act of passing magazines, commissary, or innocuous notes. I reiterate, I do not find Applicant's testimony that he was not aware of the contents of the notes or the fact that the inmates were ordered to be kept separate credible.

Applicant also attempts to minimize his conduct by pointing out that another corrections officer who passed a note between the same inmates received only a thirty-day suspension. He further attempts to explain the harsh treatment he received as retaliation for exercising his right to seek legal representation. GE 3 explains the fully-justified reasons for the disparate treatment, not the least of which is the totally innocuous content of the note passed by the other office. GE 3 also establishes that Applicant's termination was based solely upon his conduct and not an attempt at retaliation for the exercise of a legal right.

Applicant also places much reliance on the fact that shortly before he was terminated similar, if not identical, charges to some that formed the basis for his termination had been found to be "Not Sustained." Suffice it to say that when the misconduct of Applicant passing notes between inmates was discovered it was totally reasonable for the sheriff's department to revisit the earlier investigation and view the charges therein in the light of the additional information that was then available to them concerning Applicant's activities.

I have considered all Guideline E Mitigating Conditions (MC) and find that MC 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*; and MC 7: *Association with persons involved in criminal activities has ceased* apply in this case. Additionally, Applicant receives credit under the "whole person" concept for his four years of honorable military service, reflected not only by his receipt of an honorable discharge, but also award of the Army Achievement Medal and Army Commendation Medal. He receives further credit for the five years of faithful service he gave to the sheriff's department, evidenced by the awards, commendations, and evaluations that have been admitted into the record, as well as his steady home and family life.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Once again, it must be noted that no one has a right to a security clearance<sup>(16)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(17)</sup>

After considering the evidence of record in this case, and weighing the disqualifying conditions against the mitigating condition, I find that Applicant has failed to mitigate the security concern caused by his personal conduct. The gravity of the misconduct that resulted in his termination from employment as a corrections officer, a position of trust, prevents a finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. Guideline E is decided against Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the 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 a security clearance for Applicant.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. The full report of this investigation is contained in AE N.
3. AE N
4. The full report of this investigation is contained in GE 3.
5. Copies of the notes are included in GE 3.
6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
7. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
8. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
9. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
10. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
11. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
12. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
13. *Egan*, 484 U.S. at 528, 531.
14. *Id* at 531.
15. *Egan*, Executive Order 10865, and the Directive.
16. *Egan*, 484 U.S. at 528, 531.
17. *Id* at 531.