

DATE: June 30, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-14601

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Marc E. Curry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant, a former Chief Petty Officer in the U.S. Navy, committed various violations of the Uniform Code of Military Justice (UCMJ) during his career. He also deliberately omitted some of the relevant information about those violations from his most recent security clearance questionnaire. He has failed to mitigate the resulting security concerns about his criminal conduct (Guideline J) and personal conduct (Guideline E). Clearance is denied.

**STATEMENT OF THE CASE**

On December 3, 2003, in accordance with DoD Directive 5220.6, as amended (Directive), the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns about his personal and criminal conduct. The SOR further informed Applicant that, based on information available to the government, DOHA adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to continue Applicant's security clearance. [\(1\)](#)

On December 16, 2003, Applicant responded to the SOR (Answer) and admitted to the allegations in SOR subparagraphs 1.a, [\(2\)](#) 1.c, 1.d, 2.a and 2.b. He also requested a determination without a hearing. On March 31, 2004, DOHA Department Counsel submitted a file of relevant materials with 6 exhibits (Items 1 - 6) attached (FORM) in support of the government's preliminary decision, a copy of which was sent to Applicant on April 1, 2004. Applicant received the FORM on April 7, 2004, and had until May 7, 2004 to submit additional information in response to the government's case. However, Applicant did not submit anything further in his own behalf and the case was assigned to me on May 20, 2004.

**FINDINGS OF FACT**

Applicant's aforementioned admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is a 42-year-old logistician employed by a defense contractor since May 2001. He also served in the U.S. Navy between 1979 and 2000, achieving the rank of Chief Petty Officer (E-7). He has been married since June 1985. <sup>(3)</sup>

On April 6, 2000 Applicant appeared at Captain's Mast aboard the aircraft carrier to which he was assigned. He was found guilty of violating the UCMJ as follows:

- a. Failure to Obey a Lawful Regulation (Article 92) because he had engaged in an improper relationship with a female Airman Recruit (E-1);
- b. Maltreatment Toward a Lower Grade Person (Article 93, two counts);
- c. Making a False Official Statement with Intent to Deceive (Article 107) because he had lied to the Executive Officer of his command;

He was issued a punitive letter of reprimand, restricted to the ship for 45 days, and ordered to forfeit one-half his pay for two months, which was suspended for six months. <sup>(4)</sup>

On June 8, 1984, Applicant, then a Petty Officer Second Class (E-5) was found guilty at Captain's Mast of violating UCMJ Article 134 because he had used THC, the active ingredient in marijuana. He was restricted to the ship for 45 days (15 of which were suspended for six months), reduced in rate to E-4 and ordered to forfeit one-half his pay for two months. <sup>(5)</sup>

Applicant submitted a security clearance questionnaire (SF 86) on August 27, 2001. In response to question 24, which asked if he had ever been charged with or convicted of a drug-related offense, he answered "no" despite the fact he had been charged in 1984 with unlawful use of THC as noted above. He also answered "no" to question 25, which asked if he had been subject to disciplinary proceedings under the UCMJ in the preceding seven years. His answer contradicts the fact of his appearance at Captain's Mast 16 months earlier. <sup>(6)</sup>

### **POLICIES**

The Directive sets forth adjudicative guidelines <sup>(7)</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 SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed under 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>(8)</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>(9)</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>(10)</sup>

### CONCLUSIONS

Under Guideline E (personal conduct), conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. <sup>(11)</sup> Department Counsel has presented sufficient evidence in the FORM to establish a *prima facie* case for disqualification under this guideline and I conclude that Guideline E disqualifying condition (DC) 2 <sup>(12)</sup> applies here. Applicant admits he falsified his answers to but denies the premise of Guideline E. Yet he has provided nothing to refute, extenuate or mitigate the concerns raised by his apparently deliberate falsification. Therefore, there is no basis for application of any of the listed mitigating conditions. His falsifications were deliberate, multiple, and recent. Based on the forgoing, and in consideration of the fact he lied to his Executive Officer in April 2000, I conclude Guideline E against the Applicant.

Under Guideline J (criminal conduct), a security concern exists where it is shown an Applicant is willing to disregard the law. Such conduct indicates an inability or unwillingness to abide by rules and procedures established to protect classified information. <sup>(13)</sup> Department Counsel has presented sufficient evidence in the FORM to establish a *prima facie* case for disqualification under this guideline and I conclude that Guideline J DC 2 <sup>(14)</sup> applies here. Applicant was a career senior enlisted member who committed numerous UCMJ violations involving drug use, lying, and generally abusing the trust of junior enlisted members by engaging in improper relationships with junior females and mistreating subordinates. <sup>(15)</sup> There is no basis for application of any listed mitigating conditions. I conclude Guideline J against the Applicant.

I have carefully weighed all of the evidence, and I have applied the 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. These facts raise reasonable doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to resolve those doubts, which Applicant failed to provide, I cannot conclude it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

### 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: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

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

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: 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 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. SOR 1.a lists three counts of violation of the UCMJ. Applicant underlined Counts 2 and 3. I interpret this to mean he admits these counts but denies Count 1.
3. Item 4.
4. Item 5.
5. Item 6.
6. Item 4.
7. Directive, Enclosure 2.
8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
9. *See Egan*, 484 U.S. at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A5.1.1.
12. 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;
13. Directive, E2.A10.1.1.
14. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
15. There is no basis whatsoever in the record for the allegations in subparagraphs 1.b and 1.c.