

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. 02-20003

## **DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on July 14, 1999, and a Security Clearance Application (SF 86) on September 13, 2000, and failed to disclose in both forms that he had been discharged from employment in February 1996 for engaging in unethical conduct and unsatisfactory performance. He has failed to mitigate the security concern caused by his personal and criminal conduct in falsifying those forms. Clearance is denied.

### **STATEMENT OF THE CASE**

On June 11, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant submitted a response to the SOR, dated June 20, 2003, and requested a clearance decision based on the written record without a hearing. In his response to the SOR, Applicant admitted both SOR allegations, although he did attempt to provide some justification for each allegation.

Department Counsel prepared a File of Relevant Material (FORM) on September 30, 2003, that was mailed to Applicant the same day. Applicant submitted a response to the FORM dated October 14, 2003, that was forwarded to Department Counsel on October 16, 2003. Department Counsel did not object to Applicant's response. The case was assigned to me October 23, 2003.

### **FINDINGS OF FACT**

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

Applicant is a 60-year-old man who has been employed by a defense contractor as a shipping and receiving clerk since August 28, 2000. He is a high school graduate, and served on active duty with the United States Air Force from June 28, 1960, until July 1, 1980. He was a Technical

Sergeant, E-6, when released from active duty. He has been married to his present wife since July 5, 1985. He was previously married from March 29, 1975, to December 31, 1980. His prior marriage ended in a divorce.

Applicant has held managerial positions with several different employers from the time of his release from active duty to the present. He was employed as a project manager by one of those employers from October 1995 to February 1996. He was discharged from that employment because of "unfavorable employment or conduct" and found to not be eligible for rehiring because of reasons relating to his unfavorable employment. The specific basis for his discharge was: "Unethical conduct and unsatisfactory performance for a Project Manager/Supervisor. Falsification of Time Sheets."

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on July 14, 1999, and answered "No" to question 12: *YOUR EMPLOYMENT RECORD - Has any of the following happened to you in the last 7 years? If "Yes" begin with the most recent occurrence and go backward providing date fired, quit, or left, and other information requested - 1 Fired from a job; 2 Quit a job after being told you'd be fired; 3 Left a job by mutual agreement following allegations of misconduct; 4 Left a job by mutual agreement following allegations of unsatisfactory performance; 5 Left a job for other reasons under unfavorable circumstances.*

Applicant submitted a Security Clearance Application (SF 86) on September 13, 2000, and answered "No" to question 20: *YOUR EMPLOYMENT RECORD - Has any of the following happened to you in the last 10 years? - 1 Fired from job; 2 Quit a job after being told you'd be fired; 3 Left a job by mutual agreement following allegations of misconduct; 4 Left a job by mutual agreement following allegations of unsatisfactory performance; 5 Left a job for other reason under unfavorable circumstances.*

The answers to both questions were false, because Applicant was required by the plain language of the questions to disclose the fact that he had been terminated from employment in February 1996. Applicant also misstated the dates of his employment with that employer by claiming to have worked for the company until August 1996 in the SF 85P he submitted and August 31, 1996 in the SF 86 he submitted. He listed his next employment in both documents as starting in September 1996, and thus by misstating the dates of his prior employment did not have to explain the apparent unemployment that occurred between February and September 1996. Both forms were signed by Applicant and certified as being accurate, subject to the criminal penalties imposed by Section 1001 of title 18, United States Code.

Applicant provided a statement to a special agent of the Defense Security Service on February 13, 2003 in which he claimed that the reason he did not list the termination of employment was: "because I was only there 4 months and did not think of it at the time I filled out my security form." He also claimed in that statement that the misstated dates of employment were accidental and mistakes. In his response to the FORM, Applicant indicated the reason for not listing the termination of employment was because he just forgot about that job. None of Applicant's explanations for the false information provided in the SF 85P and SF 86 are credible.

### POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief 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, Guidelines E, pertaining to personal conduct, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are 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>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>(4)</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</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>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</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>(11)</sup>

### CONCLUSIONS

Personal conduct under Guideline E 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. Appellant's lack of candor in failing to disclose that he had been fired from a prior job when he submitted the SF 85P and SF 86 severely undermines the ability to place such trust and confidence in Applicant at the present time. The justifications he provided in the statement given to the special agent and in his answer to the FORM are not credible and provide further evidence that Applicant is not worthy of the trust that must be placed in a person who has access to the nation's secrets. His false and/or misleading answers and explanations raise significant security concerns.

Disqualifying Condition (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material fact 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*; and DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination* apply in this case. I have considered all Mitigating Conditions under Guideline E and do not find any apply in this case. Guideline E is decided against Applicant.

Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break rules.

Applicant falsely certified and submitted both the SF 85P and SF 86 subject to the criminal penalties imposed by section 1001 of title 18, United States Code. DC 1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged* and 2: *A single serious crime or multiple lesser offenses* apply in this case. I have considered all Mitigating Conditions under Guideline J and do not find any apply in this case. Guideline J is decided against Applicant.

After considering the evidence, I find that Applicant has failed to mitigate the security concern caused by his personal and criminal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

SOR ¶ 1-Guideline J: 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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

9. *Egan*, 484 U.S. at 528, 531.

10. *Id* at 531.

11. *Egan*, Executive Order 10865, and the Directive.