

DATE: September 30, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-20349

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant falsified his security clearance application, a violation of 18 U.S.C. § 1001, by knowingly and willfully failing to acknowledge he had been arrested for driving while intoxicated. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 5 May 2003, DOHA issued a Statement of Reasons (SOR) under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive<sup>(2)</sup> detailing the basis for its decision-failure to meet the personal conduct (Guideline E) and criminal conduct (Guideline J) personnel security guidelines of the Directive. Applicant answered the SOR in writing on 12 June 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 12 August 2003. On 29 August 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 8 September 2003.

### **FINDINGS OF FACT**

On 7 May 1998, Applicant was arrested and charged with driving while intoxicated (DWI). Ex. 4; Ex. 3 at 2. Subsequently, in September 1998, Applicant pled guilty to the charge. Ex. 3 at 2. Applicant continues to drink alcoholic beverages, but in moderation. His use of alcohol has not caused him any other problems with the law, his schools, or his work place. Ex. 3 at 3.

On 13 October 2000, Applicant, who was then 23 years old, signed a security clearance application (SCA) attesting that his answers were "true, complete, and correct to the best of [his] knowledge and belief." He acknowledged understanding that "a knowing and willful false statement could be punished by fine, imprisonment, or both" under 18 U.S.C. § 1001. Ex. 2 at 10. Question 24 on the SCA asked if Appellant had ever been charged or convicted of any

offense related to drugs or alcohol. Applicant answered, "no." *Id.* at 8.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant deliberately falsified his SCA by failing to answer question 24 accurately (¶ 1.a.) and was arrested for driving while intoxicated in 1998 (¶ 1.b.). Under Guideline E, 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. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence that Applicant deliberately omitted relevant and material information from his SCA. DC 2.2. Applicant admits that he deliberately failed to acknowledge his 1998 DWI arrest because he was concerned that his employer and fellow employees would learn of his arrest, he would not get a security clearance, and he would lose his job. Ex. 3 at 3; Tr. 9, 20-21. He claims that he hoped to speak to a Defense Security Service (DSS) agent about his arrest and his concerns. Tr. 9. But Applicant never contacted DSS in the approximately 16 months between the submission of his SCA and his being confronted by a DSS agent. Tr. 22. Applicant's shame over his DWI arrest, and the steps he took to conceal it from others, made him a prime candidate for blackmail. An applicant's self-interest in protecting his reputation and keeping his job does not justify or excuse his deliberate falsifications. *See* ISCR Case No. 99-0442, 1999 DOHA LEXIS 164 at \*4 (App. Bd. Apr. 22, 1999). Applicant did not make a prompt good-faith effort to correct the falsification before being confronted by the DSS agent. Therefore, MC 3.3 does not apply; nor do any of the other mitigating conditions listed under this guideline. Finding is against Applicant on ¶ 1.a.

The Government alleged in ¶ 1.b. that Applicant was arrested for DWI. Reliable, unfavorable information may be a security concern if it demonstrates an applicant's conduct involves questionable judgment, unreliability, dishonesty, or unwillingness to comply with rules and regulations. DC 2.1. However, Applicant demonstrated that alcohol is not a problem for him. After applying the adjudicative process factors contained in the Directive ¶ 6.3, I conclude Applicant's DWI does not represent a security concern under Guideline E. However, Applicant's DWI is evidence that supports a conclusion Applicant omitted relevant and material facts from his SCA. *See* SOR ¶ 1.a. Finding is for Applicant.

### **Guideline J--Criminal Conduct**

In the SOR, DOHA alleged Applicant violated 18 U.S.C. § 1001 by deliberately omitting information about his alcohol-related arrest from his SCA. ¶ 2.a. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness.

It is a felony to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the United States Government. 18 U.S.C. § 1001(a)(2). The granting of a security clearance is a matter within the executive branch of the United States Government. *See Egan*, 484 U.S. at 527. Knowingly and willfully falsifying an SCA constitutes a violation of 18 U.S.C. § 1001. ISCR Case No. 01-06870, 2002 DOHA LEXIS 469 at \*13 (App. Bd. Sep. 13, 2002) (citing *United States v. Yermian*, 468 U.S. 63 (1984)). The Government established by substantial evidence that Applicant committed a serious offense. Applicant admitted he deliberately omitted relevant and material information from his SCA. DC 1; DC 2.

Applicant contends the criminal conduct was not recent (MC 1), was an isolated incident (MC 2), and there is clear evidence of successful rehabilitation (MC 6). I disagree. The criminal conduct was recent. The falsification occurred less than three years ago and the hearing was the litigation of the falsity. Although this may be Applicant's only violation of 18 U.S.C. § 1001, it is not Applicant's only criminal conduct-he was arrested for DWI in 1998. And, while there may be evidence that he has rehabilitated himself from the drinking that led to his DWI, there is no evidence that he is rehabilitated from his criminal conduct of falsifying his SCA. In fact, at the time of the hearing, Applicant still had not informed his employer of his DWI. Tr. 24-25. Applicant failed in his burden to establish that he is clearly rehabilitated. Finding is against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

**James A. Young**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2,

1992), as amended and modified.