

DATE: June 2, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-23349

## **DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jonathan Beyer, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

In 1997, the Applicant was allowed to resign after being recommended for termination due to improper conduct. The record evidence mitigates and extenuates the negative security implications stemming from his conduct more than five years ago. Clearance is granted.

### **STATEMENT OF THE CASE**

On November 15, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On December 5, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on January 17, 2003. A Notice of Hearing was issued on February 24, 2003. On March 7, 2003, the hearing was cancelled for good cause and a second Notice of Hearing was issued on March 27, 2003, scheduling the hearing, which was held on May 2, 2003.

The Government's case consisted of seven exhibits (Gov Ex). The Applicant relied on his own testimony and the testimony of one additional witness. Following the hearing, six additional documents were received, provisions having been made for their submission following the hearing. The submissions were admitted as applicant's exhibits (App Ex) A through F. The transcript (tr.) of the hearing was received on May 12, 2003.

The SOR alleges personal conduct (Guideline E). The Applicant admits being terminated from his employment, but denies he violated policies, procedures, rules and regulations in order to be assured he could have a hearing.

### **FINDINGS OF FACT**

The Applicant is 34-years-old, has worked for a defense contractor since May 1999, and is seeking to obtain a security clearance. His supervisor states the Applicant is trustworthy, takes the job seriously, security conscience, and has

exemplary work. The Applicant does not lack candor, have questionable judgment, nor is he unreliability. He has received numerous e-mails in appreciation of his work performance. (Tr. 32)

From August 1995 through October 1997, the Applicant was employed as a city jailor. On August 24, 1997, a fellow employee used a toy gun, taken from a prisoner, to scare the Applicant. Boredom, bad judgement, and stupidity (Tr. 36) overtook the Applicant and he chose to point the same gun at several prisoners to scare them. On September 19, 1997, one of the prisoners<sup>(2)</sup>

made a formal complaint about the incident, resulting in a recommendation the Applicant be terminated because he presented a liability to the department. (Tr. 39). In October 1997, the Applicant--then age 28--was allowed to resign. (App Ex F)

The Applicant states he has had six years to reflect on the event and has learned from the incident. He does not offer excuses for his poor conduct, but acknowledges his conduct was serious, stupid, immature, completely wrong, and his actions presented a liability to the police department. He states his action that day is not a good depiction of the kind of person he was or is. (Tr. 17) He understands how his actions could have caused unfavorable criticism to the department and understand the department had no choice but to recommend his termination. (Tr. 52) In his next job following his job as jailor, he was supervised by a retired police lieutenant who helped him to realize the potential liability his actions posed for the jail and also helped him to mature. During the five and one-half years since the incident, the Applicant has married, has two children, and has more responsibility. Since the incident, his father, grandfather, and grandmother have died. The death of his father was a sobering event which has affected his maturity for the better.

Before being terminated, the Applicant received informal counselings, verbal reprimands, and two letters of reprimand (LOR), not related to the toy gun incident. In October 1995, the Applicant received a grievance form from a prisoner and put it in the prisoner's jail folder. The Applicant was verbally counseled for failing to post the prisoner's grievance on the board so the jail manager could answer it the next day.

In November 1995, the Applicant received an LOR for failing to give the prisoner a grievance form when a prisoner alleged he had been beaten and bitten by the arresting police officers. The Applicant was still in training, having been hired in August 1995, and more senior employees were present when the prisoner made his complaint. Two senior jailers<sup>(3)</sup> were present and four other officers including a supervisor and a sergeant heard the complaint. The prisoner was looking at the sergeant when he made the complaint. (Tr. 48) Regardless of the more senior officers being present, it was the Applicant job to provide a grievance form when a prisoner made a complaint and he received the LOR for not doing so.

In June 1996, the Applicant was verbally reprimand for failing to remove a prisoner's shoe laces. The Applicant said it was not standard practice to do this and there was no indication the prisoner was suicidal. In August 1996, the Applicant was verbally reprimanded because he and another employee got into a shouting match. The Applicant and another employee had a personality conflict and got into an argument in which they invited each other to go outside to settle the matter. After the shouting ended, the Applicant's shift had ended so he went home and the other person's shift started.

In February 1997, the Applicant failed to attend a prisoner's driver licence revocation hearing. Although it was on his schedule, the Applicant missed the appointment and was verbally counseled about missing the appointment. In April 1997, the Applicant received an LOR for failing to have the arresting/transporting officer do complete searches on two prisoners being brought into the jail and for failing to search these prisoners. (App Ex B) The Applicant said the search of one of the prisoners was not done because he had just witnessed the prisoner remove all of his clothes. Although the prisoner removed his socks and shoes these were not searched and they contained drugs which were taken into the jail. On the second search, he did not believe the policy required him to ensure the officer did his job properly. (App Ex B)

In August 1997, he was verbally reprimanded for stopping at a scene where police officers were working a call. He stopped at the scene because he felt a fellowship with the officer due to his job as a jailor. In September 1997, the Applicant received a verbal reprimand when he reacted inappropriately to a prisoner's poor behavior. The Applicant was unable to control his emotions and said if the prisoner continued making requests he would beat him up. The Applicant's two annual evaluations as a jailor indicated he met the standards for continued employment. (Gov 4, Tr. 41) He received a pay increase at the end of both year one and two, at the jail.

### **POLICIES**

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken

into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct (Guideline E) The Concern: 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.

Conditions that could raise a security concern and may be disqualifying also include:

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)
5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. (E2.A5.1.2.5.)

Conditions that could mitigate security concerns include:

None apply.

### **BURDEN OF PROOF**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, at page 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, at 531. As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

### **CONCLUSIONS**

The Government has satisfied its initial burden of proof under Guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. In 1997, the Applicant was terminated from his employment for pointing a toy gun at prisoners. Disqualifying Condition (DC) 1-<sup>(4)</sup> applies. During his 26 months of employment at the jail, he received two LORs and several verbal counseling concerning his work performance. Because his conduct resulted in rule violations, DC 5-<sup>(5)</sup> applies.

After considering the whole person factors, which include the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future, I find the disqualifying conditions have been mitigated.

Not everyone is suited for every job, nor is everyone good at every job they have ever had. Poor duty performance does

not, in and of itself, make a person a security risk. The Directive does not require an Applicant to be good at all of the various jobs they have held during their lifetime. Even though the Applicant "met standards" for his job as jailer, he made mistakes. Between 1995 and 1997, the Applicant was involved in a number of incidents related to his work performance. These minor violations of policy and procedure resulted in two LOR and a number of verbal counseling or reprimands. Each of these incidents although serious enough to be documented, were minor in nature and were given to insure the Applicant did his job properly.

The most serious incident occurred in 1997 which resulted in the Applicant being allowed to resign. The Applicant used a toy gun to scare prisoners. His actions were stupid and immature. The Applicant does not attempt to offer excuses for his poor conduct. He knows his actions were serious, wrong, inappropriate, and potentially damaging to the department. However, the Applicant has learned from the incident. He has had five and one half years to reflect on the incident. He is now married, has two children, and is more mature. Since the incident, the Applicant's father and grandparents have died. His father's death was an especially sobering event causing him to mature. After he left the job, the Applicant received instruction from a supervisor, a retired police lieutenant, which helped him to mature and to understand the potential liability of his actions at the jail.

The Applicant takes his current job seriously, is security conscience, has exemplary work, which is appreciated. The conduct which resulted in his termination as jailor is unlikely to repeat itself. Although serious, the Applicant's conduct five and one half years ago, as a city jailor, is mitigated. I find for the Applicant as to SOR subparagraphs 1.a. and 1.b.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. The seriousness of the Applicant's misconduct is not lessened by the prisoner's believe that he (the prisoner) was Lucifer, Satan, the Devil.
3. The jail operated with three jailers for each of three shifts.
4. DC 1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. (E2.A5.1.2.1.)
5. DC 5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. (E2.A5.1.2.5.)