

DATE: May 14, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-23630

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was convicted of burglary in 1984 and sentence to two years in prison, which he served. Applicant has had no further criminal activity since his release from prison in 1986. The Applicant did not falsify a questionnaire and has resolved his financial problems. 10 U.S.C. §986 applies. Adverse inference is not overcome. Clearance is denied.

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\*The Applicant's name is misspelled "-----" on the Statement of Reasons.

**STATEMENT OF THE CASE**

On July 16, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on August 11, 2003, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on or about November 21, 2003. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on December 4, 2003, and did not submit any additional information. The case was received by the undersigned on January 29, 2004.

**FINDINGS OF FACT**

The Applicant is 41 and married. He is employed by a defense contractor as a security officer, and he seeks to obtain a

DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

Twenty years ago, in May 1984, the Applicant was arrested for Theft of Property. According to the Applicant his brother stole several VCRs and gave the Applicant one of them. The Applicant plead guilty to the charge and was sentenced to two years imprisonment, which he served. (Government Exhibit 7.) Due to the Applicant's conviction and sentence to more than one year in prison, the provisions of 10 United States Code, Section 986 apply.

While the Applicant was in prison in 1986, he was forced by other inmates to engage in a burglary while a trustee. He was arrested for the offense, told the police what happened, and the charge was dismissed. (Government Exhibits 3 and 11.)

The Applicant has not been involved in any other criminal conduct since his release from prison in 1986. He states, "I ADMIT that I have criminal history. I know my felony record will always surface for the rest of my life. But what happened back then, stayed in the past. I have been working hard for the society to accept me, to rely on me, and to trust me. I succeeded doing just that. God knows I'm a reliable, and trustworthy person. I'm asking you to open your heart and have trust in me." (Government Exhibit 3 at 1.)

Paragraph 2 (Guideline F - Financial considerations). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he is financially overextended and therefore at risk of having to engage in illegal acts to generate funds.

Subparagraph 2.a. of the SOR alleges that the Applicant owes over \$2,000 for a set of Encyclopedia Britannica. Government Exhibits 9 and 10 show that the debt is actually in the name of the Applicant's wife. She submitted a signed, sworn statement in which she accepts responsibility for lying to the Applicant about paying the bills. In addition, she states that the Encyclopedia debt is her responsibility. (Government Exhibit 3 at 5, 6 and 8.)

The Applicant owed a deficiency balance on an automobile that was repossessed (subparagraph 2.b.). The Applicant submitted a receipt from the dealer indicating that the balance had been successfully paid off in July 2003.

Paragraph 3 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On June 5, 2000, the Applicant completed an official DoD questionnaire in which he stated that he had not had any property repossessed in the last seven years. (Government Exhibit 4, question 27.b.) This statement was incorrect, as the Applicant had an automobile repossessed in 1997. The Applicant submits that he misunderstood this question stating, "I thought, at the time, that the questions, are asking about property (land). I honestly [didn't] do anything deliberate. It was a [misunderstanding] of the questions, [that's] all." (Government Exhibit 3 at 3.)

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every

case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline J (Criminal conduct)

Conditions that could raise a security concern:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious crime or multiple lesser offenses;
- (3) Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year. [\(1\)](#)

Conditions that could mitigate security concerns:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;
- (3) the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;
- (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- (6) there is clear evidence of successful rehabilitation.

Guideline F (Financial considerations)

Condition that could raise a security concern:

- (1) a history of not meeting financial obligations.

Condition that could mitigate security concerns:

- (6) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Guideline E (Personal conduct)

Conditions that could raise a security concern:

(None of the stated conditions have application in this case.)

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct

- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal conduct, falsification and have financial difficulties that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has a felony criminal history, including a sentence to more than a year in prison (Guideline J); that he had a history of financial irresponsibility (Guideline F); and that he made an incorrect response on a Government questionnaire.

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him, except in part. Turning first to the financial conduct (Guideline F). The Applicant had two past due debts. The record shows that the debt for the encyclopedia actually belongs to his wife, who is the only debtor on the account. The wife has accepted responsibility for that debt in writing. The other debt, for a repossessed car, the Applicant paid off before he received the SOR. Disqualifying condition 1 applies to the facts in this case (*a history of not meeting financial obligations*). However, mitigating condition 6 (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) is sufficient to overcome that brief history. Paragraph 2 is found for the Applicant.

Regarding Paragraph 3 (Guideline E): The Applicant states that he misunderstood question 27.b. to only concern real property. To many lay people, the fact that the term "property" can mean real property (land) and personal property (such as automobiles), is not well understood. His explanation is reasonable and plausible and is accepted. I find that the

Applicant made a mistake in answering this question and did not intend to falsify his questionnaire. Paragraph 3 is found for the Applicant.

The Applicant's criminal conviction and sentence to more than one year in prison occurred 20 years ago, when he was a young man of 21. He served his time in prison and has no criminal record since he was released. Under normal circumstances many of Guideline J's mitigating factors would apply to this case: *(1) the criminal behavior was not recent; (2) the crime was an isolated incident; (3) the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; (6) there is clear evidence of successful rehabilitation.* However, the Applicant's sentence brings the requirements of disqualifying condition 3 into play *(conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year)*. Pursuant to Federal law, 10 United States Code, Section 986, I have no discretion and must find against the Applicant under Paragraph 1.

The Applicant's efforts at reform are noted. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons. As set forth above, Paragraphs 2 and 3 are found for the Applicant.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: For the Applicant.

Subparagraph 2.b.: For the Applicant.

Paragraph 3.: For the Applicant.

Subparagraph 3.a.: For 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. I recommend further consideration of this case for waiver of 10 U.S.C. §986.

Wilford H. Ross

Administrative Judge

1. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military

Department concerned, may authorize a waiver of this prohibition.