

DATE: October 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-20519

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was arrested several times between 1988 and 1991 for drug-related offenses related to his addiction to methamphetamine. His last arrest, for violation of his probation after testing positive for drugs, resulted in a two-year prison sentence. Available mitigation through time and change of circumstances is undermined by his deliberate falsification of his most recent security clearance application. Clearance is denied.

**STATEMENT OF THE CASE**

On June 18, 2004, 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 stemming from 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. <sup>(1)</sup>

On July 9, 2004, Applicant responded to the SOR (Answer), admitting the allegations in SOR ¶¶ 1.a, 1.d, and 1.f. He also requested a determination without a hearing. On August 9, 2004, Applicant received a file of relevant materials (FORM) generated on July 26, 2004 by DOHA Department Counsel in support of the government's preliminary decision. Applicant did not respond to the FORM and the case was assigned to me on September 17, 2004.

**FINDINGS OF FACT**

Applicant's 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 37-year-old analyst employed by a defense contractor since June 2000. This appears to be his first application for a security clearance. He has been married since August 1992. <sup>(2)</sup> In 1987, at age 19 or 20, Applicant was

introduced to illegal drugs at a party. Over the next four or five years, he used methamphetamine about three times a week and progressed to the point where he was addicted to the drug.<sup>(3)</sup>

Applicant was arrested in April 1988 and charged with possession of a controlled substance for sale, possession of a controlled substance, receiving stolen property, and possession of a loaded firearm in a motor vehicle. The firearm was the stolen property in question. Applicant was convicted of the latter three charges and the possession for sale charge was dismissed. He was sentenced to 90 days in jail and 36 months probation thereafter.<sup>(4)</sup>

SOR ¶1.b alleges Applicant was arrested in October 1988 and charged with possession of a controlled substance. SOR ¶1.c alleges he was arrested in December 1988 and charged with possession of a controlled substance and receiving stolen property. Applicant denies both allegations claiming he was in jail serving the aforementioned 90-day jail sentence after his arrest alleged in SOR ¶1.a. The SOR allegations in ¶1.b and ¶1.c are based on FORM, Item 6, an FBI report that lists these and other arrests. Applicant's claim he was in jail when he was alleged to have been arrested in December 1988 is solely by his uncorroborated Answer. Based on the available information, the October and December arrests would have occurred nearly 180 days from his arrest in April 1988, more than enough time could have elapsed for Applicant to be convicted, sentenced and served his time. However, it is also possible the FBI report reflects different stages in Applicant's processing through the criminal justice system for the same offense. Further, there is no information about what surely would have been a violation of Applicant's probation from his April 1988 arrest had he been arrested in late 1988. In short, the government's evidence in support of SOR ¶¶1.b and 1.c is inconclusive. I find for Applicant as to SOR ¶¶1.b and 1.c.

In March 1990, while apparently still on probation from his April 1988 arrest, Applicant was arrested for possession of a controlled substance. He was convicted and sentenced to 364 days in jail. After his release from jail, he was again arrested in May 1991 and charged with possession of a controlled substance, transporting a controlled substance for sale, and being under the influence of a controlled substance. In June 1991, Applicant was sent to state prison for two years because of his drug use while on probation. He actually served only nine months of this sentence.<sup>(5)</sup>

After his release from jail, Applicant pursued recovery from his addiction to methamphetamine. He attended a combination of Alcoholics Anonymous and Narcotics Anonymous for about three years and has not used illegal drugs since 1991.

Applicant submitted a Security Clearance Questionnaire (SF 86) in August 2000 after he was hired by his current employer. When answering questions about his criminal record, he deliberately omitted his most recent arrests because he did not want people at work to know about them.<sup>(6)</sup> His supervisor and a co-worker speak highly of him and the quality of his work, but there is no indication either person knows anything about Applicant's past.<sup>(7)</sup>

## POLICIES

The Directive sets forth adjudicative guidelines<sup>(8)</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 J (criminal conduct).

## BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(9)</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. [\(10\)](#)

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. [\(11\)](#)

## CONCLUSIONS

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. [\(12\)](#) Department Counsel has presented sufficient evidence in the FORM to establish a *prima facie* case for disqualification under this guideline and I conclude Guideline J DC1 [\(13\)](#) and DC 2 [\(14\)](#) apply here. Applicant was arrested at least twice for drug-related offenses between 1988 and 1991. He spent a total of 24 months in jail over this period.

By contrast, Applicant has not been involved in any criminal activity for 13 years and appears to be a sober, contributing member of society. It is clear his activities were tied to his addiction to methamphetamine and that he has overcome his drug problem. Guideline J MC 1 [\(15\)](#) and MC 4 [\(16\)](#) apply here.

Guideline J MC 6 [\(17\)](#) is also potentially applicable here. Applicant has been married for 12 years, is a father, and has been steadily employed since he left prison in 1992. Nonetheless, his deliberate concealment of his most recent arrests from his SF 86 is a violation of federal law (18 U.S.C. §1001). Questions remain, therefore, about his rehabilitation and about his trustworthiness reliability within a security suitability context. Deliberate falsification of relevant and material information is criminal conduct and undermines the government's confidence Applicant will protect the nation's interests even when doing so may be adverse to his own interests.

Title 18 U.S.C. §986 bars Applicant, absent meritorious waiver from the Secretary of Defense as provided for in 18 U.S.C. §986(d), from holding a clearance because he was convicted of a crime and sentenced to more than one year in jail. However, a reasonable assessment of available information about Applicant's criminal conduct, independent of the aforementioned statutory prohibition, raises reasonable doubts about Applicant's ability or willingness to abide by rules and regulations in place for safeguarding classified information. Absent substantial information to resolve those doubts, which Applicant failed to provide, I conclude the record evidence shows Applicant has not overcome the information supporting the government's decision to deny Applicant access to classified information.

## 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

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: 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. FORM, Item 4.
3. FORM, Item 5.
4. FORM, Items 3, 4, 5 and 6.
5. FORM, Items 3, 5, and 6.
6. FORM, Item 5. Although not alleged in the SOR or specifically discussed in the FORM, this information is directly relevant to any assessment of a person's overall trustworthiness and reliability.
7. FORM, Item 3.
8. Directive, Enclosure 2.
9. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
10. *See Egan*, 484 U.S. at 528, 531.
11. *See Egan*; Directive E2.2.2.
12. Directive, E2.A10.1.1.
13. E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
14. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
15. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
16. Directive, E2.A10.1.3.4. The person did not voluntarily commit the act *and/or the factors leading to the violation are not likely to recur*; (emphasis added)
17. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.