

DATE: December 29, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-20557

**ECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Nichole Ligon Noel, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has a long history of substance abuse. He gave false or incomplete answers on his security application to questions involving felony arrests, alcohol-related offenses, illegal controlled substance use, military disciplinary proceedings, use of illegal substances while holding a security clearance, and property repossession. He failed to disclose the extent of his illegal substance use in a signed, sworn statement to a security investigator. Applicant failed to mitigate security concerns based on drug involvement and personal conduct. He rebutted allegations involving financial considerations. Clearance is denied.

**STATEMENT OF THE CASE**

On May 10, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to revoke Applicant's security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines H (Drug Involvement), E (Personal Conduct), and F (Financial Considerations).

Applicant answered the SOR in writing on June 2, 2004. He admitted the allegations under Guidelines H and E, denied one and admitted two of the allegations under Guideline F, and requested a hearing. The case was assigned to me on September 7, 2004. On September 10, 2004, DOHA issued a notice of hearing setting the case for September 29, 2004. The case was heard as scheduled. I kept the record open for 15 days to allow Applicant to submit additional evidence. DOHA received Applicant's additional materials on October 13, 2004, and they were included in the record as Applicant's Exhibits A, B, and C. DOHA received the transcript (Tr.) on October 14, 2004.

**FINDINGS OF FACT**

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also

make the following findings:

Applicant is a 52-year-old security monitor for a defense contractor. He has substantial military and civilian government service. He enlisted in the Army National Guard in September 1971. He served on active duty in the U.S. Army from September 1972 to September 1975, and then became a member of the Army Reserve. He worked as a federal civilian employee from June 1976 until January 1990. He was recalled to active duty in March 1990 and served until February 1996, when he returned to reserve status. He was recalled again in July 2001 and served until September 30, 2001, when he returned to reserve status and began working for his current employer.

Applicant was unemployed after his release from active duty in February 1996 until March 1997. During his unemployment, he and his wife were unable to make the payments on their automobile. The automobile was repossessed in August 1996, and in September 1997 a deficiency judgment was entered against Applicant and his wife for the balance of \$7,420.00. Applicant's wife received a chapter 7 discharge in bankruptcy on October 16, 1998. Applicant believes the deficiency judgment was discharged in the bankruptcy proceedings. The deficiency judgment appears on Applicant's credit report dated August 29, 2003, but it does not appear on a credit report dated August 10, 2004. The judgment is the basis for the SOR ¶ 3.a.

Starting in 1972, Applicant smoked marijuana almost daily. In 1974 and 1975, he used lysergic acid diethylamide (LSD) about 20 times. In 1981 and 1982, he smoked marijuana laced with phencyclidine (PCP) about 20 times. He stopped smoking marijuana in 1989. In 1996 he resumed smoking marijuana, but in lesser amounts, smoking it once every two or three weeks. This conduct is the basis for SOR ¶¶ 1.c., 1.e., and 1.f.

Applicant used cocaine three or four times between 1974 and 1988. From December 1988 until February 1989, he used it almost daily. After February 1989, he did not use it against until September 2001. This conduct is the basis for SOR ¶ 1.d.

From 1994 until about 1997, Applicant was drinking a pint of brandy and a six-pack of beer daily. In 1997 and 1998, he reduced his consumption to a "couple shots of brandy" at weekend social events. From Christmas of 1998 until January 2000, Applicant consumed a pint of brandy per day.

In January 2000, Applicant was charged with operating a motor vehicle with a blood-alcohol concentration of 0.08 or more. He pleaded guilty to a lesser charge of reckless driving. He was sentenced to 30 days in jail, which was suspended, given a restricted driver's license, fined, and ordered to complete an alcohol safety action program. This conduct was the basis for the SOR ¶ 2.g.

After his conviction of reckless driving, Applicant abstained from alcohol for six months and then resumed social drinking, consuming three or four drinks per occasion. From March until June 2001, he resumed drinking a pint of brandy per day. After June 2001, he reduced his drinking to social occasions, consuming two or three beers per occasion. At the hearing, Applicant asserted he has been cured of his alcohol and drug abuse.

On September 3, 2001, while on active military duty, Applicant was charged by civilian authorities with felony possession of cocaine. On February 21, 2002, he pleaded guilty to a reduced charge of misdemeanor possession of a controlled substance. He was placed on probation for six months, given a restricted driver's license, fined, and ordered to undergo substance abuse treatment. This drug involvement was the basis for the SOR ¶ 1.a.

On September 5, 2001, Applicant's military commander administered a urinalysis, which tested positive for cocaine. On September 21, 2001, Applicant received nonjudicial punishment under the provisions of Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815, for wrongful use of a controlled substance. He was reduced from sergeant (E-5) to specialist (E-4). This conduct was the basis for the SOR ¶ 1.b.

Applicant began substance abuse treatment in October 2001, and he successfully completed it in July 2002. The records of applicant's treatment indicate it consisted of self-examination and education. There is no evidence of diagnosis or evaluation by a medical professional or licensed clinical social worker. Near the end of his treatment, Applicant was interviewed by a Defense Security Service (DSS) investigator and asserted he had no intention of using illegal substances again.

Between 1972 and 2001, Applicant spent about \$5,000.00 to purchase illegal substances. All his purchases were small, never exceeding \$100.00. During this period of drug use, Applicant held a secret clearance. This conduct is the basis for the SOR ¶¶ 1.g. and 1.h.

On November 16, 2001, shortly after beginning work with his current employer, Applicant applied for a top secret clearance. On his security clearance application (SF 86), he answered "no" to question 21, asking if he had ever been charged with or convicted of any felony. He did not disclose the felony cocaine possession charge alleged in the SOR ¶ 1.a. His negative answer is the basis for the SOR ¶ 2.a.

On the same SF 86, Applicant answered "yes" to question 24, asking if he had ever been charged with or convicted of any offenses related to alcohol or drugs. He disclosed his arrest for driving while intoxicated, but he did not disclose the September 2001 cocaine-related offenses. His incomplete answer is the basis for the SOR ¶ 2.b.

Applicant answered "no" to question 25, asking if he had ever been subject to court-martial or other military disciplinary proceedings. He did not disclose his nonjudicial punishment for use of cocaine because he was afraid he would lose his job. His negative answer is the basis for the SOR ¶ 2.c.

Applicant answered "no" to question 27, asking if he had illegally used a controlled substance in the last seven years. He did not disclose his use of marijuana and cocaine. His negative answer is the basis for the SOR ¶ 2.d.

Applicant answered "no" to question 28, asking if he had ever illegally used a controlled substance while possessing a security clearance. He did not disclose he used marijuana, PCP, LSD, and cocaine while holding a security clearance. His negative answer is the basis for the SOR ¶ 2.h.

Applicant answered "no" to question 35, asking if he had any property repossessed in the last seven years. He did not disclose the repossession of his automobile in August 1996. His negative answer is the basis for the SOR ¶ 2.e.

Applicant was interviewed by a Defense Security Service (DSS) investigator on March 7, 2002. In a signed and sworn statement, Applicant asserted that, other than the two cocaine-related events in September 2001, he had not used any illegal controlled substances in the last seven years. He did not disclose his marijuana use. This false statement is the basis for the SOR ¶ 2.f. In a second DSS interview on June 12, 2002, Applicant fully disclosed the extent of his illegal use of controlled substances.

In November 2000 Applicant received medical treatment for injuries suffered in an automobile accident. A dispute arose regarding which insurance company was liable for his medical expenses. In July 2003 Applicant sued the owner of the other vehicle for the medical expenses. The lawsuit was dismissed in September 2003 on several grounds, including the statute of limitations. Applicant has appealed the dismissal order. Applicant is willing to submit the medical bills to his own insurance company if he does not prevail in the lawsuit, but he has not done so because his appeal is pending. The unpaid medical expenses are the basis for the SOR ¶ 3.b. and 3.c.

## 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the

Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, 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*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

### **Guideline H (Drug Involvement)**

Under Guideline H, improper or illegal involvement with drugs raises questions regarding an applicant's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1. The purchase or possession of illegal drugs also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. Applicant's admissions he purchased and used marijuana, PCP, and LSD, and that he did so while holding a security clearance, prove the allegations in the SOR ¶¶ 1.a. through 1.h. and establish DC 1 and DC 2.

Although Applicant underwent court-ordered substance abuse treatment, the program consisted only of education and self-awareness. There is no evidence of a diagnosis or evaluation of drug abuse or drug dependence by a medical professional (DC 3) or licensed clinical social worker (DC 4). Thus, I conclude DC 3 and DC 4 are not established. Directive ¶¶ E2.A8.1.2.3., E2.A8.1.2.4.

Security concerns based on possession and use of marijuana can be mitigated by showing it was not recent (MC 1). <sup>(1)</sup> Directive ¶ E2.A8.1.3.1. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then the Administrative Judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant's most recent drug involvement was in September 2001. He testified that he has not used illegal substances since that date. While a three-year period might be sufficient to conclude in some cases that an applicant has been rehabilitated, I am not satisfied it is sufficient to establish Applicant's rehabilitation. From 1972 until 2001, Applicant

had only one significant period, from 1989 until about 1994, when he was not abusing marijuana, LSD, PCP, cocaine, or alcohol. However, in 1994 he relapsed, first with alcohol and then with marijuana and cocaine. The evidence reflects a long history of substance abuse, with relatively brief substance-free periods. Applicant has the burden of establishing mitigating conditions, and he has the ultimate burden of persuasion on the issue whether it is clearly consistent with the national interest to grant him a security clearance. Directive ¶ E3.1.15. I am not satisfied MC 1 is established by this record.

Drug involvement may be mitigated by showing it was an isolated or aberrational event (MC 2). Directive ¶ E2.A8.1.3.2. Based on Applicant's long history of substance abuse, I conclude MC 2 is not established.

Drug involvement may be mitigated by a demonstrated intent not to abuse illegal substances in the future (MC 3). Directive ¶ E2.A8.1.3.3. In his DSS interview and again at the hearing, Applicant stated his intent not to abuse illegal substances in the future. The issue is whether he has "demonstrated" his intent by changing his conduct. Based on his long history of substance abuse, I am not satisfied sufficient time has passed to demonstrate that his intentions can or will be carried out. Accordingly, I conclude Applicant has not carried his burden of establishing MC 3.

Although Applicant successfully completed the court-ordered substance abuse program, there is no evidence of a favorable prognosis by a credentialed medical professional (MC 4). Directive ¶ E2.A8.1.3.4. Thus, I conclude MC 4 is not established.

The "whole person" concept set out in the Directive ¶ E2.2.3. requires administrative judges to evaluate applicants by the totality of their acts and omissions. After considering all the evidence of record, and weighing the disqualifying conditions against the mitigating conditions, I conclude Applicant has not mitigated the security concerns caused by his history of drug involvement.

### **Guideline E (Personal Conduct)**

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 SOR ¶ 2.g. alleges Applicant was arrested for drunk driving and pleaded guilty to a lesser charge of reckless driving. Two disqualifying conditions are applicable to this conduct: DC 1 ("reliable, unfavorable information") and DC 5 ("a pattern of dishonesty or rule violations). Applicant's admissions in his answer to the SOR and at the hearing establish DC 1. Applicant's long history of illegal drug involvement, along with this alcohol-related offense, establishes DC 5.

None of the enumerated mitigating conditions under Guideline E are directly applicable to this offense. However, because it involves substance abuse, the mitigating conditions under Guideline H are relevant. For the reasons set out above in the discussion of Guideline H, I conclude no mitigating conditions are established for Applicant's alcohol-related conduct.

The SOR alleges Applicant intentionally gave false answers to various questions on his security application and intentionally gave false information in a signed, sworn statement to a DSS investigator. (SOR ¶¶ 2.a., 2.b., 2.c., 2.d., 2.e., 2.f. and 2.h.) Four disqualifying conditions are relevant: DC 2 (deliberate omission, concealment, or falsification of relevant and material facts in a security questionnaire), DC 3 (deliberately providing false or misleading information concerning relevant and material matters to a security investigator), DC 4 (concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, and DC 5 (a pattern of dishonesty). Directive ¶ E2.A5.1.2.2, E2.A5.1.2.3., E2.A5.1.2.4., E2.A5.1.2.5.

Applicant's admissions and the evidence of record establish DC 2 and DC 3. Applicant's explanation that he gave false answers to protect his job establishes DC 4. His drug abuse was likely to cost him both his security clearance and his job, and it made him vulnerable to coercion, exploitation, or duress by anyone who threatened to disclose it.

Although Applicant made numerous false statements, all but one occurred on November 16, 2001, when he executed the SF 86. The remaining false statement occurred during the DSS investigator's follow-up interview on March 7, 2002. While dishonesty is established, I conclude these two closely connected events do not establish a "pattern of

dishonesty." Thus, DC 5 is not established.

Applicant's marijuana use while holding a security clearance was a breach of trust. Job protection is not a mitigating condition. 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. Directive ¶ E2.A5.1.3.3. Instead, he admitted the falsifications only after being confronted with the facts by a DSS investigator. He did not make a full disclosure until the second DSS interview. His eventual full disclosure mitigated his conduct by reducing his vulnerability to coercion, exploitation, or duress. However, after weighing all the disqualifying conditions and mitigating conditions, I conclude Applicant's conduct under Guideline E is not mitigated.

### **Guideline F (Financial Considerations)**

Under Guideline F, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. Two disqualifying conditions (DC) under Guideline F could raise a security concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3.

The SOR ¶ 3.a. alleges Applicant failed to pay a deficiency judgment arising for the repossession of his automobile. Applicant denied this allegation, asserting the deficiency judgment was included in his wife's chapter 7 discharge in bankruptcy. The court records list only Applicant's wife as the petitioner, leaving some doubt whether the discharge applied to Applicant's debts. However, the judgment appeared on a credit report in August 2003 but does not appear in a 2004 credit report. Applicant's signed, sworn statement states the DSS investigator contacted the creditor and determined the creditor considered the debt settled. The burden of proving controverted facts is on Department Counsel. Directive ¶ E3.1.14. I am not satisfied Department Counsel carried her burden with respect to this debt. I conclude Applicant has rebutted this allegation.

Applicant admitted the existence of the two unpaid medical bills alleged in the SOR ¶¶ 2.b. and 2.c. He explained, however, that he was involved in an ongoing lawsuit to determine which insurance company would pay the bills. These two bills arguably establish a "history" under DC 1, but the question who is obligated to pay them is being litigated. Directive ¶ E2.A6.1.2.1. Furthermore, the record does not establish "inability or unwillingness to satisfy debts." Directive ¶ E2.A6.1.2.3. All the evidence shows is ongoing litigation to determine which insurance company will pay the bills. I conclude Applicant has rebutted these allegations.

### **FORMAL FINDINGS**

The following are my findings regarding each allegation in the SOR:

Paragraph 1. Guideline H (Drug Involvement): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Subparagraph 2.h.: Against Applicant

Paragraph 3. Guideline F (Financial Considerations): FOR APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For 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 a security clearance to Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. "Recent drug involvement" also is addressed as a disqualifying condition (DC 5) in the Directive ¶ E2.A8.1.2.5. This disqualifying condition applies only in the context of failure to successfully complete a drug treatment program. ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004) at 3.