

DATE: October 20, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-23471

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

J. Theodore Hammer, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has an extensive history of criminal conduct (street crime and drug offenses) that ended in about 1989. He has a history of financial problems, to include a Chapter 7 bankruptcy, state and federal tax debts, past-due child support, and delinquent consumer debt. He gave a false answer about his drug-related criminal conduct when he completed a security-clearance application in April 2003. He failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns stemming from these matters. Clearance is denied.

### **STATEMENT OF THE CASE**

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on October 17, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR--which is in essence the administrative complaint-- alleges security concerns under Guideline J for criminal conduct. Applicant replied to the SOR on November 26, 2005, and again on December 1, 2005, and requested a hearing.

The case was assigned to an administrative judge on March 29, 2006, and then reassigned to another administrative judge on May 18, 2006, due to caseload considerations. A notice of hearing was issued on May 23, 2006, scheduling the hearing for June 13, 2006. The case was reassigned to me on June 9, 2006, due to a schedule conflict. Applicant appeared without counsel and the hearing was continued to allow Applicant to respond, in writing, to a motion to amend the SOR. Another notice of hearing was issued and the hearing reconvened on July 31, 2006. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcripts on June 22, 2006, and August 9, 2006, respectively.

### **RULINGS ON PROCEDURE**

Department Counsel moved, in writing, [\(2\)](#) to amend the SOR in a rather extensive fashion by:

- Deleting superfluous language from SOR subparagraph 1.w;
- Adding three subparagraphs of criminal conduct to SOR paragraph 1;
- Adding a Guideline E (Personal Conduct) allegation as SOR paragraph 2 with three subparagraphs; and
- Adding a Guideline F (Financial Considerations) allegation as SOR paragraph 3 with nine subparagraphs.

Without objections, I granted the motion during the initial hearing on June 13<sup>th</sup>. Applicant was given until June 30<sup>th</sup> to respond to the amended SOR, which he did.

### FINDINGS OF FACT

After considering the record evidence as a whole, I make the following findings of fact.

1. Applicant is a 58-year-old man who is employed as a truck driver. He has worked for his current employer since October 1999. He is seeking to retain a secret-level security clearance that was granted to him in about 1997 for his job with another employer.
2. Applicant married in 1991 and separated in December 2001. His current marital status is separated. The marriage produced two children, and his wife brought one child into the marriage. In addition, Applicant has three children from a second woman and one child from a third woman.
3. Applicant has a lengthy history of criminal conduct, which he does not dispute, from 1965 to about 1989. His offenses are numerous, many are old, and thus, he does not remember many of the details. During a background investigation, Applicant provided a written statement addressing his criminal conduct and his criminal record.<sup>(3)</sup> In his statement, he admitted being arrested about 20 times, all arrests occurring between his 18<sup>th</sup> and 42<sup>nd</sup> birthday. Also, he gave his version of each arrest, so far as he could remember, and his statements are incorporated herein as findings of fact.<sup>(4)</sup> In general, the arrests were for offenses such as breaking and entering, larceny, burglary, drug offenses (including a heroin offense), assault, shop lifting, possession of a deadly weapon, etc.
4. In addition to his arrests, Applicant has been convicted of crimes on several occasions and served jail time three or four times. In his response to the SOR, Applicant admitted that he was convicted about ten times for various offenses (SOR subparagraphs 1.a, 1.c, 1.d, 1.f, 1.k, 1.p, 1.q, 1.s, 1.u, 1.v, and 1.w).
5. In response to SOR subparagraph 1.u, he admitted serving 16 months in a state prison due to a criminal conviction and sentence in 1985 and a subsequent probation violation. But at the hearing he said that, to the best of his recollection, he never served more than one year in jail. The only documentary evidence on this matter is a FBI Identification Record. It is less than clear on how much time Applicant served in jail.<sup>(5)</sup> Based on Applicant's recollection, along with the absence of documentary evidence (for example, court records or prison records), the evidence is not sufficient to find that Applicant served more than one year in jail.
6. SOR subparagraph 1.r alleges Applicant's 1982 arrest for contempt of court resulting in his serving jail time. The only documentary evidence on this matter is an arrest report that reflects Applicant was arrested for "paternity, contempt" due to his failure to comply with an order from a domestic relations court.<sup>(6)</sup> Given the absence of evidence showing that this was criminal contempt, I find this was civil contempt as would be the normal treatment for failing to obey an order from a domestic relations court.<sup>(7)</sup>
7. SOR subparagraphs 1.y, 1.bb, and 1.cc, allege, as criminal conduct, that Applicant failed to file federal income tax returns in 2002 and 1996 and state income tax returns in 2002 and 2003. Although Applicant did not file returns for these years, I find the evidence does not establish he did so deliberately and willfully. It appears this occurred due to negligence.
8. In addition to his criminal history, Applicant has experienced financial problems. Applicant and his wife<sup>(8)</sup>

obtained a Chapter 7 bankruptcy discharge in 1998. Applicant attributes the action to his wife's spending habits and her living beyond their means. He explained that he was not involved in the decision to pursue bankruptcy, and that his wife simply told him one day that he had to go to a certain office and sign paperwork. In July 2002, Applicant's employer received an order/notice to withhold income for child support.<sup>(9)</sup> The order directed his employer to withhold \$46 monthly for past-due support. In January 2003, Applicant's employer submitted an adverse-information report to the Defense Department.<sup>(10)</sup> The adverse information was that the employer had received a notice of levy from the IRS against Applicant in the amount of \$28,427 for unpaid federal income taxes for tax years 1996, 1997, 1998, 2000, and 2001. His employer was required to withhold money in successive pay periods until the full amount was paid. This was accomplished in about July 2005 when the IRS certified that Applicant satisfied the taxes for the years in question.<sup>(11)</sup> A credit report from April 2003 reveals derogatory information, to include the following: (1) four unpaid collection accounts; (2) one charged-off bad debt; (3) and five past-due accounts, two of which are for child support.<sup>(12)</sup> In April 2005, Applicant's employer submitted an adverse-information report to the Defense Department.<sup>(13)</sup> The adverse information was that the employer had received notice of a state income tax wage lien against Applicant in the amount of \$1,174 for unpaid income taxes for tax years 2002 and 2003.

9. Applicant does not have a good grasp of his financial affairs during the time he and his wife were together. He explained that his wife handled all the bill paying and financial matters, to include filing tax returns. He was generally unaware of the specifics, including her overspending that led to the bankruptcy. He points out that the accounts he opened in his name with his employer's credit union are in good standing.<sup>(14)</sup> Other than the federal income tax debt, Applicant did not present any documentary evidence showing his efforts to pay or otherwise resolve the other seven debts alleged in the SOR.

10. In April 2003, Applicant completed a security-clearance application for his employer.<sup>(15)</sup> In completing the application, he was required to answer questions about his background. The SOR alleges that Applicant gave deliberately false answers to three questions. Each is discussed below.

11. In response to Question 22,<sup>(16)</sup> he answered "yes" and reported a 1975 possession of a hand gun offense. He did not report his arrest and charge for a 1972 deadly weapon offense. In his response to the amended SOR, Applicant explained that he did not remember the 1972 deadly weapon offense.

12. In response to Question 24,<sup>(17)</sup> he answered "yes" and reported a marijuana possession offense from 1989. He did not report two drug-related offenses from 1975 and 1976 involving heroin. For the 1975 offense, he was arrested and charged with possession of heroin. For the 1976 offense, he was arrested and charged with possession of heroin and this matter resulted in a conviction with jail time. In his hearing testimony, he explained that he was aware of the heroin offenses when he answered Question 24. Also, he explained that he picked what he wanted to say, in that he decided to reveal the marijuana and not the heroin when answering the question.<sup>(18)</sup>

13. In response to Question 38,<sup>(19)</sup> he answered "no" and he did not report any of the debts alleged in SOR subparagraphs 3.c-3.i that fell in this category. Based on his hearing testimony, it appears Applicant did not fully understand how to answer Question 38.

14. Applicant attributes his criminal conduct and drug problems to a troubled childhood lacking a strong father figure and falling in with the wrong crowd. Through drug rehabilitation and involvement with a church, Applicant learned how to be a man, how to work for a living, and how to care for a family. He submitted documentary evidence on these matters, to include a character reference concerning his recovery process, a letter from a doctor stating Applicant does not have a current drug or alcohol problem, and a drug testing report showing negative results.<sup>(20)</sup>

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance

eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. (21) A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty. (22) Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (23) There is no presumption in favor of granting or continuing access to classified information. (24) The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted. (25) An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven. (26) In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (27)

No one has a right to a security clearance. (28) And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (29) Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

### 1. The Criminal Conduct Security Concern

Under Guideline J, (30) criminal conduct is a concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling sensitive information.

Here, based on the record evidence as a whole, a security concern is raised under Guideline J. The record evidence shows Applicant has a history or pattern of criminal conduct over a period of many years. He has numerous arrests, several convictions, and has served jail time three or four times. Given these facts and circumstances, both DC 1 (31) and DC 2 (32) apply against Applicant. His extensive history of criminal conduct creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the MC under the guideline and conclude that Applicant receives some credit in mitigation. In particular, the vast majority of his criminal history (the street crime and drug offenses) ended in about 1989. In this sense, his criminal conduct is not recent within the meaning of the guideline. (33) The credit is limited, however, based on his falsification of his security-clearance application, discussed below, which is also criminal conduct under federal law (18 U.S.C. § 1001).

### 2. Applicability of 10 U.S.C. § 986

In addition to the normal security concern under Guideline J, the SOR alleges (in subparagraph 1.z) that Applicant is statutorily ineligible for a security clearance based on a conviction and sentence in 1985 that resulted in him serving one year and four months in state prison. The statute at issue is 10 U.S.C. § 986, the so-called Smith Amendment. (34)

In 2000, a federal law was enacted that prohibited the Defense Department from granting or continuing a security clearance for any applicant if that "person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year."<sup>(35)</sup> The effect of the legislation was to disqualify a person with a conviction in state, federal, or military court with a sentence imposed of more than one year regardless of the amount of time actually served, if any.

Congress amended certain parts of the law in 2004. As amended, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited or narrowed. The law now disqualifies an applicant if "the person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year."<sup>(36)</sup> The effect of the legislation is that an applicant who has been sentenced to more than one year, but instead served probation, or who served less than a year of incarceration, is not--as a matter of law--ineligible to hold a security clearance.

Here, the government seeks to disqualify Applicant asserting he served 16 months in state prison. As noted in paragraph 5 of the findings of fact, the evidence is rather skimpy on this point. Therefore, I conclude that 10 U.S.C. § 986 does not apply here because the available, reliable information does not establish that Applicant was incarcerated for more than one year.

### **3. The Financial Considerations Security Concern**

Under Guideline F,<sup>(37)</sup> a security concern typically exists for two different types of situations--significant unpaid debts or unexplained affluence. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Here, based on the record evidence as a whole, a security concern is raised under Guideline F. Applicant has a history of not meeting financial obligations as well as inability or unwillingness to pay one's just debts.<sup>(38)</sup> This is established by the Chapter 7 bankruptcy, the tax debts to both state and federal governments, the past-due child support, and the consumer debt.

I reviewed the MC under the guideline and conclude Applicant receives some credit in mitigation. It appears that some of his indebtedness is attributable to his marriage and separation,<sup>(39)</sup> and I considered these matters. But the credit in mitigation is limited, however, because Applicant has not taken any meaningful action since his separation in 2001 to clear up some of these outstanding matters. The remaining MC do not apply. Other than the tax debt to the federal government, he has not presented sufficient evidence, including documentary evidence, to establish that he has made a good-faith effort to pay or otherwise resolve his debts. Also, at this point it is too soon to tell if Applicant can establish a track record of prudent and responsible financial management.

### **4. The Personal Conduct Security Concern**

Personal conduct under Guideline E<sup>(40)</sup> is always a security concern because it asks the central question: Does a person's past conduct justify confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Here, based on the record evidence as a whole, a security concern is raised under Guideline E. It's crystal clear

that Applicant deliberately provided a false answer to Question 24 concerning drug-related offenses when he decided to reveal his marijuana offense, but not the heroin offenses. (41) What's less clear, however, are his answers to Question 22 about firearms offenses and Question 38 about his financial delinquencies. I am not persuaded that Applicant deliberately provided a false answer to Question 22, because he disclosed a 1975 firearms offense and forgot about the 1972 offense. Likewise, I am not persuaded that Applicant deliberately provided a false answer to Question 38, because he did not fully understand the question and he did not have a firm grasp on the particulars of his financial situation. To sum up, his false answer to Question 24 about drug-related offenses shows questionable judgment, lack of candor, unreliability, and untrustworthiness.

I reviewed the MC under the guideline and conclude none apply. Making false statements during the security-clearance process is a serious matter, not easily explained away, extenuated, or mitigated.

## **5. The Whole-Person Concept**

I considered the available information in light of the whole-person concept. Applicant is a mature 58-year-old man who has held a security clearance for some years. (42) His has an extensive history of criminal conduct (street crime and drug offenses) that appears to be a thing of the past. Also, he has a history of failing to fulfill his financial obligations, which is ongoing and likely to continue. (43) Other than the federal income tax debt, he did not present any documentary information showing his efforts to resolve these matters. (44) More troubling, however, is his false answer on his April 2003 security-clearance application, which is serious matter as well as constituting criminal conduct under federal law. (45) Considering the record evidence as a whole, I conclude Applicant failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns arising under Guidelines J, E, and F. And he has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

## **FORMAL FINDINGS**

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

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a-q: Against Applicant

Subparagraph r: For Applicant

Subparagraphs s-x: Against Applicant

Subparagraphs y-z: For Applicant

Subparagraph aa: Against Applicant

Subparagraphs bb-cc: For Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraph a & c: For Applicant

Subparagraph b: Against Applicant

SOR ¶ 3--Guideline F: Against Applicant

Subparagraphs a-i: Against 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 Applicant. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Appellate Exhibit I.
3. Exhibit 8.
4. Exhibit 8 at 3-7.
5. Exhibit 10 at 5.
6. Exhibit 15.
7. In general, contempts are classed as civil or criminal, and the SOR allegation fails to allege either. A criminal contempt is a crime that consists in the obstruction of judicial duty generally resulting from an act done in the presence of the court; for example, conduct toward the judge or refusal to answer questions after a grant of immunity. A civil contempt generally arises from a willful failure to comply with a court order, such as an injunction or an order to pay child support.
  8. Exhibit 3.
  9. Exhibit 4.
  10. Exhibit 5.
  11. Exhibit F.
  12. Exhibit 2.
  13. Exhibit 6.
  14. Exhibit 2.
  15. Exhibit 1.
16. "Have you ever been charged with or convicted of a firearm or explosives offense?"
17. "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"
18. R. 52.
19. In the last 7 years, have you been over 180 days delinquent on any debt(s)?"
  20. Exhibits B, D, and E.
  21. Directive, Item E2.2.1.
  22. Executive Order 10865, § 7.

23. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
24. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
  25. Directive, Enclosure 3, Item E3.1.14.
  26. Directive, Enclosure 3, Item E3.1.15.
  27. Directive, Enclosure 3, Item E3.1.15.
28. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).
  29. 484 U.S. at 531.
  30. Directive, Enclosure 2, Attachment 10.
31. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
  32. Directive, Item E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
    33. Directive, Item E2.A10.1.3.1. The criminal behavior was not recent.
  34. For background information on the origin of this statutory prohibition, see Attorney Sheldon I. Cohen's publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the "Smith Amendment,"* which can be found at [www.sheldoncohen.com/publications](http://www.sheldoncohen.com/publications).
  35. 10 U.S.C. § 986(c)(1) (2001).
  36. 10 U.S.C. § 986(c)(1) (2004).
  37. Directive, Enclosure 2, Attachment 6.
38. Directive, Item E2.A6.1.2.1. A history of not meeting financial obligations; Item E2.A6.1.2.3. Inability or unwillingness to satisfy debts.
39. Directive, Item E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separation).
40. Directive, Enclosure 2, Attachment 5.
41. Directive, Item E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.
  42. Directive, Item E2.2.1.4. The individual's age and maturity at the time of the conduct.
  43. Directive, Item E2.2.1.9. The likelihood of continuation or recurrence.
44. Directive, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes.



45. Directive, Item E2.2.1.1. The nature, extent, and seriousness of the conduct.