

DATE: November 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-33766

## **DECISION OF ADMINISTRATIVE JUDGE**

**MARY E. HENRY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Lowry, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant was arrested and charged with two second degree sexual felony offenses in 1987 and cited for threatening and intimidating acts in 1997. He pled guilty to a third degree sexual felony offense in 1988 and was placed on probation. The court dismissed the case related to the 1997 charges. The record shows no further similar activity. He inadvertently failed to disclose the 1997 citation in his security application. The security concerns raised by his criminal conduct have been mitigated by the passage of time and his successful rehabilitation. Likewise, the security concerns raised under Guideline E, Personal Conduct, have been mitigated. Clearance is granted.

### **STATEMENT OF THE CASE**

On April 27, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 Applicant. Specifically, the SOR set forth security concerns arising under Guideline E, Personal Conduct, and Guideline J, Criminal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On May 28, 2004, Applicant submitted a notarized response to the allegations. He requested a hearing.

This matter was assigned to me on September 13, 2005. A notice of hearing was issued on September 26, 2005, and a hearing was held on October 11, 2005. Sixteen Government Exhibits and twenty-one Applicant Exhibits were admitted into evidence. (1) Applicant requested to correct, for the record, his statement to the investigator that "I went to court and lied" to "I went to court with the intent to lie". (2) After voir dire, the government did not object. (3) Applicant and one witness testified. The record was held open to allow him to submit additional documentary evidence. He submitted the

additional documentation to which no government objection was made. The hearing transcript (Tr.) was received on October 20, 2005.

### **FINDINGS OF FACT**

Applicant admitted, with explanation, the allegations in Guideline E (subparagraphs 1.a. (1) and 1.b) and Guideline J (subparagraph 2.a through 2.c) of the SOR.<sup>(4)</sup> Those admissions are incorporated here as findings of fact. He denied allegation 1.a and neither admitted or denied allegation 1.c. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 46-year-old systems engineer for a defense contractor.<sup>(5)</sup> He has worked for this contractor for twenty-four years.<sup>(6)</sup> He served six years in the United States Marine Corps.<sup>(7)</sup> He completed a security clearance application (SF 86) in April 2002.<sup>(8)</sup>

Applicant has been married for twenty-four years.<sup>(9)</sup> He has three children, a daughter, age 24, and two sons, ages 23 and 16.<sup>(10)</sup> In June 1987, he was arrested and charged with molestation of a child, a class two felony, and sexual conduct with a minor under fifteen, a class two felony, based on allegations of sexual abuse to his daughter, then age 6.<sup>(11)</sup> In March 1988, he signed a plea agreement.<sup>(12)</sup> On April 4, 1988, he pled guilty to attempted molestation of a child, a class three felony.<sup>(13)</sup> The court withheld imposition of a sentence and placed him on 10 years probation, fined him, and ordered him to complete human sexuality counseling.<sup>(14)</sup> Five years later, the court terminated his probation and restored his civil rights.<sup>(15)</sup>

Subsequent to his arrest, Applicant attended individual and group therapy for nearly two years. Although he continued to provide for his family financially, he lived apart from them until April 1989, when, with the approval of his counselors and probation officer, he moved back into the family home.<sup>(16)</sup> His family has remained together since his return.

In April 1990, Applicant received a SOR notifying him that his security clearance may be revoked because he pled guilty to attempted molestation of a child in 1988, and physically abused his wife and daughter.<sup>(17)</sup> Following a hearing, the administrative judge granted a clearance in a decision dated November 27, 1990.<sup>(18)</sup> The administrative judge found that Applicant had successfully responded to counseling, improved his family relationships and cooperated with his probation officer.<sup>(19)</sup> There have been no further incidences of sexual or physical abuse.

In 1992, he received his Bachelor of Science degree, and in 1998, he received a Master of Science degree.<sup>(20)</sup> He continues to enhance his skills through on-the-job training.<sup>(21)</sup> He has received an achievement award from his employer, and in his latest performance evaluation, his supervisor rated him acceptable.<sup>(22)</sup>

In early 1997, Applicant also worked a part-time job.<sup>(23)</sup> On January 16, 1997, he spoke with a customer about her payment for goods with an out-of-state check.<sup>(24)</sup> He advised the customer that his employer declined to accept the out-of-state check, as it was against company policy. He asked the customer to pay for the goods by cash or write a check to him.<sup>(25)</sup> The customer refused, despite being told that the money would come out of his pay.<sup>(26)</sup> He became angry.<sup>(27)</sup> The customer called him names, to which he responded that he could have some friends do a drive by.<sup>(28)</sup> Within a few minutes of this statement in a second telephone call, he apologized to the customer.<sup>(29)</sup> She, however, filed a report about the incident with the police.<sup>(30)</sup> As part of their investigation, the police requested that he come to the police station to review this report, which he did.<sup>(31)</sup> While at the police station, he gave them a statement, denying that he had made a threatening statement to the customer.<sup>(32)</sup> The police gave him a citation, but did not formally arrest him, book him, and place him in jail.<sup>(33)</sup> He appeared for the court hearing.<sup>(34)</sup> However, the judge dismissed the case without taking testimony from anyone.<sup>(35)</sup> The record does not contain a hearing transcript for this court proceeding.

Applicant failed to list this incident on his security application, although he listed his 1999 bankruptcy and family members who are not U.S. citizens.<sup>(36)</sup> He forgot about the incident until reminded by the investigator.<sup>(37)</sup> He had thrown out all the papers, including the citation, related to the 1997 incident, and had put it out of his mind.<sup>(38)</sup>

The investigator prepared a statement addressing this omission for Applicant to sign, which he did.<sup>(39)</sup> In this statement, he admitted he told the customer that some friends could do a drive by and that he opted to lie to the police about the statement.<sup>(40)</sup> He also stated that "I went to court and lied",<sup>(41)</sup> a statement he asked to correct at the hearing to reflect that he intended to lie in court.<sup>(42)</sup> In his response to the SOR and at the hearing, he stated that the court dismissed this case without taking testimony.<sup>(43)</sup>

Applicant's daughter wrote a letter and testified on his behalf.<sup>(44)</sup> She currently works for the same defense contractor.<sup>(45)</sup> She described her father as loving and caring.<sup>(46)</sup> She does not feel threatened or intimidated by him.<sup>(47)</sup> He kept her from dropping out of high school.<sup>(48)</sup> He taught her to do her best and to respect others.<sup>(49)</sup> His older son also wrote a letter on his behalf.<sup>(50)</sup> He describes his father as a spiritually guided man, a loyal and patriotic man, and an outstanding father.<sup>(51)</sup> His youngest son performs very well in school.<sup>(52)</sup>

Ten of Applicant's co-workers and family friends wrote letters on his behalf.<sup>(53)</sup> Without exception, all expressed confidence in him and in his ability to safeguard secrets.<sup>(54)</sup> His co-workers described him as a professional, who is dedicated to his job, and a man of integrity.<sup>(55)</sup> They described him as loyal, honest, trustworthy and helpful to others.<sup>(56)</sup> He teaches part-time.<sup>(57)</sup> His students give him high marks as a teacher.<sup>(58)</sup>

## POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(59)</sup> The government has the burden of proving controverted facts.<sup>(60)</sup> The burden of proof is something less than a preponderance of the evidence.<sup>(61)</sup> Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(62)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(63)</sup>

No one has a right to a security clearance<sup>(64)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(65)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(66)</sup> Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the

national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. <sup>(67)</sup> 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.**

**Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has not established its case under Guideline E. In subparagraph 1.a and 1.a. (1), the government alleges that Applicant falsified material facts on his latest security clearance application when he failed to list the 1997 police citation for threatening and intimidating conduct. For Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...*) and PC DC E2.A5.1.2.3. (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator...*) to apply, the government must establish that Applicant's omission, concealment or falsification in regards to the 1997 citation was a relevant and material fact and was deliberate. <sup>(68)</sup> He listed his 1987 felony conviction for child molestation and his 1999 bankruptcy, as well as identified family members who are not citizens of the United States, all potentially disqualifying conditions. The 1997 incident did not result in his arrest; rather, the police issued a citation which commanded him to appear in court to answer the charges against him. Once the court dismissed the charge, he threw away all documents connected to this case and forgot about it. He did not remember the incident until the investigator questioned him about it. He then willingly discussed what he remembered about the incident. Because he provided other detrimental information, the government has not established that he intentionally and deliberately failed to provide this information when he completed his security clearance application.

In subparagraph 1.b., the government alleges that he made a false report to the police when he gave a statement, denying that he made a threatening statement in January 1997. The customer involved in the 1997 dispute filed a complainant (report) with the police, not Applicant. While conducting their investigation, the police took a statement from him about the incident. He was not truthful in his statement. However, providing a false statement during a police investigation is not the same as making a false report. The government has failed to establish that he made a false report. Likewise, since the state court dismissed the threatening and intimidation charges without taking testimony, the government has not established that he lied to the court as alleged in subparagraph 1.c. Since the government failed to establish its case under Guideline E, I find in favor of applicant.

The government has established its case under Guideline J as to allegations 2.a and 2.b. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegation or admission of criminal misconduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*) apply. In 1987, Applicant was arrested for two counts of child molestation, second degree felony criminal offenses. He pled guilty to attempted molestation of a child, a third degree felony. He received no jail time for this felony offense, but was placed on ten years probation. <sup>(69)</sup> In 1997, he received a citation for threatening and intimidating conduct. His conduct clearly falls under the disqualifying conditions of this guideline.

Since I have concluded that Applicant did not intentionally and deliberately fail to disclose his 1997 citation when preparing his security clearance application, the government cannot establish that he violated Title 18, United States

Code, Section 1001 under allegation 2.c. [\(70\)](#)

I considered the Criminal Conduct Mitigating Conditions (CC MC) and concluded that CC MC E2.A10.1.3.1. (*The criminal behavior was not recent*); and CC C E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*) apply. Applicant's arrest and subsequent plea for attempted molestation of a child occurred in 1987 and 1988, over 17 years ago. Since then, he has not been arrested or charged with similar conduct. His 1997 citation for threatening conduct is almost nine years old. The court dismissed this case without rendering a decision regarding the criminality of his conduct. He has maintained steady employment for the last 24 years; has improved his financial record after filing bankruptcy in 1999; has maintained a home for his family; raised his children to be responsible adults; and remained married to his wife. He provided strong guidance to his children as they grew into productive adults or successful students. I conclude that the Applicant has successfully mitigated and overcome the government's case under Guideline J as to allegations 2.a and 2.b.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence in this case, that Applicant has shown a significant change in his behavior. Through counseling, he learned about himself and his behavior towards his wife and children. He successfully modified his conduct towards them, creating a more caring and stable family life. He furthered his education and guided his children with theirs. He has assumed responsibility for his 1987 and 1997 actions. I conclude that the Applicant has successfully mitigated and overcome the government's case as to his past criminal conduct.

Since signing his personal statement, Applicant has provided additional details concerning the events surrounding the 1997 incident based on he recall and additional documentation. His supplemental information is not indicative of an intent to lie, as the incident in question occurred more than five years ago. His decision to lie to the police about the threatening statement he made in January 1997, and to lie in court had the case proceeded to trial, however, is troublesome. He has admitted his conduct and taken responsibility for it. Because of their often weekly and daily interactions at work with him, his co-workers find him as a man of integrity and honesty in the work place. Their confidence in him to safeguard the national security combined with his decision to acknowledge his past lying weigh in favor of granting him a clearance. I find that he has overcome the government's case as related to his false statements. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to Applicant.

Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to Applicant.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

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

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

**DECISION**

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

Mary E. Henry

Administrative Judge

1. Applicant Exhibit B (Applicant's response to SOR) was not admitted into evidence as it was a duplicate document.
2. Government Exhibit 2 (Applicant's signed statement, dated September 10, 2002) at 3; Tr. at 39-41.
3. Tr. at 41.
4. Applicant's Response to SOR, dated May 28, 2004, at 1.
5. Government Exhibit 1 (Security Clearance Application, dated April 28, 2002) at 1.
6. *Id.*
7. *Id.* at 6.
8. *Id.* at 1.
9. *Id.* at 2.
10. *Id.* at 4.
11. Government Exhibit 11 (Court documents related to 1987 criminal charges) at 1.
12. *Id.* at 12-17.
13. *Id.* at 9-10, 20.
14. *Id.* at 21.
15. *Id.* at 29-31.
16. *Id.* at 20-25; Government Exhibit 16 (United States Department of Defense, Directorate for Industrial Security Clearance Review Hearing Transcript, dated August 29, 1990) at 68.
17. Government Exhibit 15 (Statement of Reasons, dated April 16, 1990, and Determination of Administrative Judge, dated November 27, 1990) at 6-7.
18. *Id.* at 1-5.
19. *Id.*
20. Applicant Exhibit T at 2-3; Tr. at 44.
21. Applicant Exhibits D, E at 1-4.
22. Applicant Exhibits E at 5, F.
23. Government Exhibit 2, *supra* note 2, at 1.

24. *Id.* at 2; Tr. at 45.
25. *Id.*; Tr. at 45-46.
26. *Id.*
27. *Id.*
28. *Id.*
29. Government Exhibit 14 (Police report, dated January 17, 1997) at 3.
30. *Id.* at 1-6.
31. Tr. at 47.
32. Government Exhibit 14, *supra* note 29, at 5.
33. *Id.*
34. Government Exhibit 2, *supra* note 2, at 3; Tr. at 39-41.
35. Tr. at 38.
36. Government Exhibit 1, *supra* note 5, at 4, 5, 8, 9.
37. Government Exhibit 2, *supra* note 2, at 2; Tr. at 51.
38. Tr. at 50-51.
39. Government Exhibit 2, *supra* note 2, at 4.
40. *Id.* at 3.
41. *Id.*
42. Tr. at 39-40.
43. Tr. at 38; Applicant's response to SOR, *supra* note 4.
44. Applicant Exhibit G (Letter dated May 27, 2004); Tr. at 53-56.
45. Tr. at 55.
46. *Id.* at 54.
47. *Id.*
48. *Id.*
49. *Id.*
50. Applicant Exhibit H (Letter dated May 20, 2004).
51. *Id.*
52. Applicant Exhibit S (Letter dated March 31, 2004).

53. Applicant Exhibits I through R (Signed letters).
54. *Id.*
55. *Id.*
56. *Id.*
57. Tr. at 38-39; Government Exhibit 2, *supra* note 2, at 1.
58. Applicant Exhibit V (Student evaluation comments).
59. ISCR Case No. 96-0277 (July 11, 1997) at 2.
60. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
61. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
62. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
63. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
64. *Egan*, 484 U.S. at 531.
65. *Id.*
66. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
67. Executive Order No. 10865 § 7.
68. Applicant denied that he deliberately falsified his security clearance application. He admitted that he was cited by the police (subparagraph 1.a. (1)), and that he told the police that he did not make a threatening statement (subparagraph 1.b). As he did not admit or deny the remaining allegation (subparagraph 1.c), it is deemed denied.
69. Since the court deferred imposition of a sentenced and placed Applicant on probation for ten years, I will not consider his conviction under 10 U.S.C. § 986.
70. Applicant admitted that falsification constituted a felony under Title 18, United States Code, Section 1001, not that he deliberately falsified his security clearance application.