

DATE: December 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-04874

**DECISION OF ADMINISTRATIVE JUDGE**

**MARC E. CURRY**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The criminal conduct security concern generated by Applicant's three convictions between 1995 and 2003 were mitigated by his youth at the time of the offenses, their minor nature, and the extenuating circumstances surrounding the conduct. Applicant's failure to disclose the most recent offense on his security clearance application raises an unmitigated security concern. Clearance is denied.

**STATEMENT OF THE CASE**

On June 19, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating it was unable to find that it was clearly consistent with the national interest to grant or continue a security clearance. (1) The SOR alleged security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct. Applicant answered the SOR on July 5, 2006. He admitted subparagraphs 1.b and 1.c, and denied subparagraphs 1.a, and 2.a. Also, he elected to have the case decided on the written record.

Department Counsel mailed the government's file of relevant material (FORM) to Applicant on July 24, 2006. He received it on August 4, 2006, and submitted a response on August 18, 2006. He did not object to any of the FORM submissions. The case was assigned to me on August 29, 2006. On October 19, 2006, Applicant submitted an untimely request for a hearing. (2) I denied it on November 7, 2006.

**FINDINGS OF FACT**

I have incorporated Applicant's admissions into the findings of fact. In addition, I make the following findings of fact.

Applicant is a 27-year-old man with an associate's degree in computer networking, who works in the field of remedy development. His job performance is "of the highest caliber." (3)

(4)

Applicant is a single father with one child, age seven. As of March 2003, he was separated from his wife. Based on his October 2006 Response to the FORM, in which he states that he lives with his fiancée, I find that he and his wife divorced sometime between March 2003 and October 2006.

In 1995, Applicant was caught attempting to shoplift a calculator from a department store. Subsequently, he was arrested, charged with conversion, found guilty, and sentenced to one year of probation, and 10 days of community service. <sup>(5)</sup>

In 1998, Applicant was charged with theft and underage consumption of alcohol after being caught attempting to steal a cigarette lighter from a department store. He was found guilty, and sentenced to four days in jail, followed by five days of community service, in addition to one year of probation. <sup>(6)</sup>

In January 2003, Applicant confronted an acquaintance and hit him in the mouth after discovering that he had been having an affair with his wife. Subsequently, he was arrested and charged with "Battery Causing Bodily Injury." <sup>(7)</sup> He was found guilty, sentenced to three weeks in jail, 20 hours of work on a road crew, and 164 days supervised probation. <sup>(8)</sup> Contrary to the allegation in SOR subparagraph 1.a., he did not fail to complete the probation. This allegation was apparently based on an inaccurate distortion of Applicant comment to an investigator, in November 2003, that he would "be off probation at the end of this month, when [his] road crew days [were] complete[d]." <sup>(9)</sup>

Applicant failed to list the battery charge on his SF 86, executed in April 2003, in response to Question 26 (*In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?*). <sup>(10)</sup> He asserted in his Response to the FORM that he "did not think [he] was supposed to list the arrest since [he] had not been convicted" of the charge at the time he completed the SF 86. <sup>(11)</sup> He also answered "no" to Question 23 of the SF 86 (*Are there any charges pending against you for any criminal offense?*). <sup>(12)</sup>

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (mitigating conditions).

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 Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process involves an evaluation of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

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

**Guideline E - Personal Conduct:** 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to these adjudicative guidelines are set forth and discussed in the conclusions below.

Since the protection of national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is "clearly consistent with the national interest"<sup>(13)</sup> In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's loyalty is not at issue in these proceedings. 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."

## CONCLUSIONS

### **Criminal Conduct**

Between 1995 and 2003, Applicant was arrested, charged, and convicted of criminal offenses on three separate occasions. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, 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.

The first two criminal offenses were minor, and occurred when Applicant was a teenager. The third offense arose from marital problems he was experiencing at the time. Now that he is divorced and is engaged to marry another woman, it is highly unlikely that the circumstances leading to the criminal offense will recur. Applicant has matured, as demonstrated by his exceptional work performance, and the fact that he has custody of his son. Criminal Conduct Mitigating Condition (CC MC) 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*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) apply.

### **Personal Conduct**

Applicant's failure to list the January 2003 arrest in response to Question 26 of the SF 86, raises the issue of whether Personal Conduct Disqualifying Condition (PC DC) 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*) applies. His assertion that he thought he was only required to list the charge if it resulted in a conviction is fatally undercut by the fact that he also failed to list it in response to Question 23, which required the disclosure of pending charges.

I conclude that he falsified the SF 86 by failing to include the January 2003 arrest in response to Question 26. No

mitigating conditions apply.

### **Whole Person Concept**

Applicant's two earliest criminal offenses were minor and occurred when he was a teen. Although the 2003 arrest for battery was not minor, it was mitigated somewhat by the surrounding circumstances. Upon evaluating these offenses in light of their nature, extent and seriousness, <sup>(14)</sup> the surrounding circumstances, <sup>(15)</sup> and Applicant's age at the time, <sup>(16)</sup> I conclude that the likelihood of recurrence <sup>(17)</sup> of such criminal activity is minimal.

Applicant's falsification of the SF 86 generates lingering doubts about his security clearance worthiness. He intentionally concealed the 2003 arrest, and compounded this duplicity by manufacturing a specious explanation for the omission. Upon evaluating his conduct in its totality, I conclude he is an unacceptable candidate for a security clearance.

### **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 J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2 - Guideline E: AGAINST APPLICANT

Subparagraph 2.a: 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.

Marc E. Curry

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended. (Directive).
2. See Directive ¶¶ E2.1.4 and E3.1.7.
3. Recommendation Letter of a Senior Systems Engineer at Applicant's Company, dated July 5, 2006, as included in Item 3, Answer, dated July 5, 2006, at 5.
4. Item 4, SF 86, electronically submitted April 30, 2003, at 9.
5. Item 3, Answer, dated July 5, 2006, at 1; Item 5, Signed, Sworn, Statement, dated November 7, 2003, at 1.
6. Item 3, at 2.
7. Item 3 at 1.
8. *Id.*

9. Item 5, Signed, Sworn, Statement, dated November 7, 2003, at 2.

10. *See* note 3 at 12.

11. Response to FORM, received by DOHA, October 10, 2006.

12. *See* note 3 at 11.

13. *See* Directive, Sec. 2.3, Sec. 2.5.3, Sec. 3.2, and Sec. 4.2.

14. Directive, ¶ E2.2.1.1.

15. Directive ¶ E2.2.1.2.

16. Directive ¶ E2.2.1.4.

17. Directive ¶ E2.2.1.9.