

DATE: July 12, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-26908

**DECISION OF ADMINISTRATIVE JUDGE**

**MARC E. CURRY**

**APPEARANCES**

**FOR GOVERNMENT**

Edward Loughran, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant served approximately two years in prison as the result of a felony drug conviction in 1988, and he was charged and convicted for driving under the influence of alcohol in 1996. Although he mitigated the criminal conduct security concerns, 10 U.S.C. § 986, as amended, disqualifies him from eligibility for a security clearance. Clearance is denied.

**STATEMENT OF THE CASE**

On September 16, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to 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.<sup>(1)</sup> The SOR alleged a security concern under Guideline J, criminal conduct.

Applicant answered the SOR on October 6, 2005, admitting all of the allegations and requesting a hearing. The case was assigned to me on November 27, 2005. On February 13, 2006, I scheduled a hearing for March 14, 2006, and held it as scheduled. At the hearing, the government provided 12 exhibits. Applicant provided 25 exhibits and the testimony of two witnesses. DOHA received the transcript on March 23, 2006.

**FINDINGS OF FACT**

Applicant is a 47-year-old married man who has three children. He is an information systems network technician whose duties include, among other things, maintaining, installing, and configuring his employer's various network systems.<sup>(2)</sup> He earned an associates degree in computer science in 1987.

Applicant served in the Marines from 1976 to 1980. During this period, he committed a number of criminal infractions under Article 15 of the Uniform Code of Military Justice (UCMJ) that led to several nonjudicial punishment (NJP) actions. In June 1977, he received NJP for failing to get out of bed on time, and disobeying an order to maintain his bed.

(3) In March 1978, he received NJP for possession of marijuana. In January 1979, he was charged for being absent without leave, and received NJP of 15 days in correctional custody. Between June 1979 and April 1980, he was charged twice with failure to go to appointed place of duty, and received separate NJP for both violations. In 1980, Applicant was honorably discharged from the Marines, but was determined to be ineligible for reenlistment due to the excessive NJPs. (4)

On September 3, 1985, Applicant received a traffic citation for driving with an expired license. He was sentenced to 7 days in jail and ordered to pay a \$500 fine.

In the mid-1980s, Applicant began abusing cocaine. By 1986, he was using it up to three times per week. (5) In 1987, he became involved in a cocaine-dealing criminal enterprise. Specifically, he would deliver cocaine from a dealer to patrons and employees of a restaurant where he worked. In exchange, he was compensated with free cocaine. (6) In January 1988, Applicant was arrested and charged with unlawful possession of a controlled substance, unlawful delivery of a controlled substance, and unlawful possession of a cocaine. (7) He was convicted and sentenced to 26 months for counts one and two, in addition to nine months for count three. Applicant ultimately served approximately 23 months in prison.

While in prison, Applicant voluntarily participated in an intensive three-month substance abuse program that met five days per week for six hours per day. (8) He has neither used nor sold drugs since his arrest in 1988.

In February 1996, Applicant was arrested and charged with driving under the influence of alcohol (DUI). He was found guilty and sentenced to 365 days imprisonment, with 364 days suspended, fined, and ordered to obtain an alcohol assessment. The counselor who conducted the alcohol assessment recommended that Appellant attend an alcohol-treatment program. Applicant "dragged [his] heels with regard to the treatment," (9) prompting the court to sentence him to 30 days in jail for failure to comply with the court order. After he was released from jail, Applicant enrolled in an alcohol-treatment program and successfully completed it in July 1999. (10)

On May 3, 1997, Applicant was driving at approximately 2:00 a.m. without using his headlights and was stopped by the police. He was issued a citation for driving with defective headlights and driving with a suspended license. Also, he was arrested on an outstanding warrant related to the February 1996 DUI, and served 21 days in jail as a result. It is unclear from the record evidence what precipitated the issuance of the arrest warrant related to the 1996 DUI. Applicant has not drunk to the point of intoxication since 1999, and has not been arrested or charged with a crime since 1997.

Applicant has held a security clearance since approximately 1990. (11) He is highly respected in his community, and is "an exceptionally reliable employee who always does the job assigned and does it right." (12)

## **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 Disqualifying Conditions (DC) that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information, and Mitigating Conditions (MC) that may be considered in deciding whether to grant an individual's eligibility for access to classified information.

An administrative judge need not view the adjudicative guidelines as inflexible 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 is a conscientious scrutiny 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.

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

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

The pertinent disqualifying and mitigating conditions are discussed in the conclusions below.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provided policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that, among other things, precluded the initial granting or renewal of a security clearance by the Department of Defense to any officer, director, or employee of a DoD contractor who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." [\(13\)](#)

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases." Implementing guidance attached to the memorandum indicated that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of *more than* one year, regardless of the amount of time actually served."

On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of Subsection (c)(1) of 10 U.S.C. § 986, thereby altering it to read as follows:

(1) 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* (Emphasis of change supplied).

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the national interest." [\(14\)](#) In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation, or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard 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

Under Guideline J, criminal conduct is a security 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 classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline J. While in the Marines, Applicant committed several criminal infractions resulting in nonjudicial punishment. After his stint in the Marines, he was also convicted of a drug-related felony in 1988, and a DUI in 1996. DC 1 [\(15\)](#) and DC 2 [\(16\)](#) apply.

Drugs, alcohol, and immaturity contributed to Applicant's past criminal behavior. He has not used illegal drugs since 1988, and he completed a drug-treatment program more than 15 years ago. He completed an alcohol-treatment course in 1999, and has not drunk to the point of intoxication since 1999. He has neither been charged with nor arrested for a crime in nearly 10 years. MC 1, [\(17\)](#) MC 4, [\(18\)](#) and MC 6 [\(19\)](#) apply.

Applicant has mitigated the Guideline J security concern. Because he served more than one year in jail as a result of the conviction, however, 10 U.S.C. § 986 applies. Therefore, Applicant is disqualified from eligibility 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: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: For the Applicant

Subparagraph 1.j.: 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 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 and modified (Directive).
2. Exhibit N, Applicant's Resume.
3. Exhibit 6, Applicant's USMC Service Record Book Pages (date illegible), at 1.
4. *Id.*
5. Exhibit 4, Statement, dated October 5, 1993, at 4.
6. *Id.*
7. Answer, dated October 6, 2005, at 2; Exhibit 10, Applicant's State Criminal History Record, compiled September 14, 2001, at 6.
8. Exhibit 3, Statement, dated May 26, 1993, at 2.
9. Exhibit 5, Statement, dated May 28, 2003, at 3.
10. Certificate of Completion, dated July 22, 1999, as included in Exhibit S, Miscellaneous Documents, at 5.
11. Tr. at 50.
12. Exhibit C, Reference Letter from Business Operations Branch Head, dated February 23, 2006.
13. 10 U.S.C. § 986(c)(1).
14. *See generally*, Directive, Sec. 2.3., Sec. 2.5.3., Sec. 3.2., and Sec. 4.2.
15. Directive, ¶ E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
16. Directive, ¶ E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
17. Directive, ¶ E2.A10.1.3.1. The criminal behavior was not recent.
18. 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.
19. Directive, ¶ E2.A10.1.3.6. There is clear evidence of successful rehabilitation.