

DATE: October 19, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 04-07654

## **DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 35 years old and works for a federal contractor. He has a history of criminal conduct and financial problems. When he completed his 2000 Questionnaire for National Security Positions, he did not disclose an employment termination, two criminal arrests and a delinquent debt. He failed to mitigate the security concerns raised by his criminal and personal conduct, but did mitigate those raised by his financial problems. Clearance is denied.

### **STATEMENT OF THE CASE**

On September 4, 2000, Applicant completed and signed a Questionnaire for National Security Positions (SF-86), and on September 27, 2000, electronically submitted a security clearance application (SCA). On July 5, 2005, the Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons under Guidelines J (Criminal Conduct), E (Personal Conduct), and F (Financial Considerations) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On August 9, 2005, Applicant filed a response to the SOR, admitting most of the allegations. On October 6, 2005, he filed a subsequent response and elected to have the case decided on the written record in lieu of a hearing. On November 11, 2005, Department Counsel prepared a File of Relevant Material (FORM), along with Government Exhibits (GX) 1-19, and mailed Applicant a complete copy on November 23, 2005. The FORM was mailed to him again on April 21, 2006, because he was deployed for a period of time and did not receive it. He received the FORM on July 3, 2006, and had 30 days from its receipt to file objections and submit material in refutation, extenuation, or mitigation. He timely filed additional documents to which the Department did not object. I marked those documents as GX 20. This case was assigned to me on August 14, 2006.

## PROCEDURAL MATTERS

The Government filed a Motion to Amend the SOR and gave notice of it to the Applicant in the FORM that was mailed to him on November 23, 2005, and April 21, 2006. Applicant did not file an objection thereto. Hence, the Motion is granted and allegations 2.e and 2.f are amended to include "Questionnaire for National Security Positions" and strike references to "security clearance application." Subparagraph 2.e is further amended to strike reference to Question 38 and insert Question 28.a, and subparagraph 2.f is amended to strike reference to Question 39 and insert 28.b.

## FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his response to the SOR, I make the following findings of fact:

Applicant is 35 years old, married and has two children. He has worked for a federal contractor since June 2000. (GX 6) He submitted a SF-86 on September 4, 2000, and a security clearance application (SCA) on September 27, 2000. He served in the United States Navy from December 1989 until July 1991, at which time he received an Other Than Honorable Conditions Discharge (OTH). (GX 8 at 2) Subsequently, he held various jobs, one of which was with a stage agency. (GX 6) In April 2003, he enlisted in the Army National Guard and was deployed from December 2005 until June 2006, when he was released from active duty with an Honorable Discharge. (GX 20)

Applicant admitted that from June 1991 until May 1992, he received six Non-Judicial Punishments in the Navy for various offenses, including Unauthorized Absences, Misbehavior of a Sentinel, Unlawful Entry, Disorderly Conduct and Larceny. He was ordered to forfeit portions of his pay for numerous months, had his privileges restricted, was required to perform extra duty, and placed on bread and water for three days. (GX3) He is not proud of his previous conduct. (GX 3 at 2).

From approximately June 1994 until November 1999, Applicant worked for a state Department of Public Health. (GX 3 and 6) In September 1998, he was arrested and charged with Criminal Sexual Assault 1<sup>st</sup> for an incident allegedly involving a female patient at a youth home where he was working as a psychiatric technician. The charge was later dismissed. In November 1999, he was arrested and charged with Criminal Sexual Assault 3<sup>rd</sup> Degree, after engaging in consensual sexual intercourse in an official vehicle with a woman who was staying at the domestic shelter within the substance abuse treatment center where he worked. He was subsequently terminated from his position. The criminal case was dismissed in March 2000 because the woman, whom he previously dated, was not a patient but a resident of the shelter. (GX 3 and 7) Applicant admitted he was married at the time and exercised poor judgement in that instance. He asserted that he is now a responsible individual. (*Id.* at 4; 6)

When Applicant signed his September 2000 SF-86, he swore his answers were "true, complete and correct." In response to Question 11: Your Employment Activities: (*List your employment activities, beginning with the present and working back 7 years. You should list all full-time work, part-time work, military service, temporary military duty locations over 90 days, self-employment, other paid work and all periods of unemployment*), he listed he had been employed at a mall from January 1999 to November 1999. He did not disclose his employment at the substance abuse treatment center from August 1999 to November 1999.

In response to Question 22: Your Employment Record (*Has any of the following happened to you in the last 7 years? (1) Fired from a job; (2) Quit a job after being told you'd be fired; (3) Left a job by mutual agreement following allegations of misconduct; (4) Left a job my mutual agreement following allegations of unsatisfactory performance; (5) Left a job or other reasons under unfavorable circumstances*), he answered "No." He failed to disclose his termination from the substance treatment center and the underlying reason for it. In a September 2001 statement, Applicant claimed he did not disclose the three-month employment period because he "completely forgot " about the time period and "tried to forget everything bad that happened to me before." (GX 8 at 2) In his August 2005 response he admitted he chose not to disclose the information because he was embarrassed by the 1999 charges that were dismissed. (GX 3 at 3; 4)

In response to Question 23: Your Police Record: (*For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record . . . In the last 7 years, have you been arrested*

for, charged with, or convicted of any offenses(s) not listed in response to a, b, c, d, or e above?), Applicant answered "No." He did not disclose the 1998 and 1999 arrests, and criminal sexual assault charges. He denied that he intentionally falsified the SF-86, because he did not think he was required to disclose dismissed charges. (GX 3 at 5)

In response to Question 27(d): Your Financial Record: (*In the last 7 years, have you had any judgments against you that have not been paid*), Applicant answered "No," and did not disclose a \$9,158 judgment entered in December 1999 related to a 1994 car loan. (GX 10) In his response to the SOR he did not answer the SOR allegation referencing this issue (¶ 2.d), but previously stated he did not disclose the judgment because at the time he completed the SF-86 he was making payments on the debt and did not consider it to be unpaid. (GX 8 at 2) According to a payment report, he made payments from May 1999 until August 1999, and then sporadically from the end of February 2000 to April 2002. (GX 18) In August 2005, a Stipulated Payment & Order was entered requiring him to pay \$50 per month until the judgment is paid. (GX 3) In his February 2002 statement he admitted he could not pay the debt because he was unemployed for a period of time. (GX 7)

In response to Question 28( a): Your Financial Delinquencies: (*In the last 7 years have you been over 180 days delinquent on any debts*), and Question 28 (b): (*In the last 7 years have you been over 90 days delinquent on any debts*), Applicant answered "No," and did not disclose the defaulted car loan. He did not answer the allegations contained in SOR ¶¶ 2.e and 2, f alleging the falsification of these questions.

In addition to the delinquent car loan, the SOR also alleged that Applicant owed \$118 to a cable company and \$30 to a hospital. The cable company debt remains unpaid, but the hospital bill has been paid.

Applicant's supervising officer in the National Guard wrote a letter of recommendation on his behalf. (GX 3)

### POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria that must be evaluated when determining security clearance eligibility. Within those guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify or may disqualify, the applicant from being eligible for access to classified information.

*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability. ISCR Case No. 95-0611 at 3 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government. 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 clearance." *Id.*

## CONCLUSIONS

I have considered all of the facts in evidence and the application of the appropriate legal standards, including the "whole person" concept, and conclude the following with respect to the allegations set forth in the SOR:

### Guideline J: Criminal Conduct

Under the criminal conduct guideline, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. In this case the Government raised a potential disqualification under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions 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*). Applicant admitted he received a Non-Judicial Punishment on six separate occasions for multiple minor charges from 1991 to 1992. In addition, he was arrested and charged with criminal misconduct in 1998 and 1999. Applicant also admitted he deliberately chose not to disclose a 1999 employment termination and the underlying reason on his September 2000 SF-86, which constitutes a criminal violation of Title 18, United States Code, Section 1001, a felony.

The Government having established its case, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing all of the mitigating conditions under this guideline, in particular three of them, I conclude none apply. (1) As there are six separate incidents of criminal conduct that occurred in the Navy and one related to his SF-86, Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.2 (*The crime was an isolated incident*) is not applicable. (2) Although the six charges occurring from 1991-1992 may be mitigated due to the passage of time, the falsification occurred in September 2000, and is sufficiently recent and not mitigated under CC MC E2.A10.1.3.1 (*The criminal conduct was not recent*). (3) Applicant acknowledged his misconduct and offered a letter of recommendation from his former supervising officer in mitigation. However, that evidence does not demonstrate sufficient rehabilitation or change in conduct, as required under CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), given his deliberate falsifications in 2000.

### Guideline E: Personal Conduct

Under this guideline a security concern arises when 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. Based on the evidence, the Government established a potential disqualification under Guideline E, specifically, 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*). Applicant admitted he intentionally falsified his answers to Questions 11 and 22, as alleged in SOR ¶¶ 2.a and 2.b, because he was embarrassed by his conduct.

Applicant denied that he intentionally failed to disclose the two criminal charges as alleged in ¶ 2.c, but believed he did not need to reveal them because they were dismissed. Based on his articulated feeling of embarrassment over them and his inconsistent September 2001 statement in which he claimed he did not disclose the termination and underlying incident because he "forgot," I do not find his explanation credible. I believe he intentionally withheld the information and later disclosed it because it was raised by the Government. Nor do I find his earlier explanation for failing to disclose the financial delinquencies, as alleged in ¶¶ 2.d, 2.e, and 2.f, credible. At the time he completed the SF-86 in

September 2000, he knew he was responsible for paying the car loan, and had stopped paying it from September 1999 until the end of February 2000, during which time the December 1999 judgment order was entered. The question is clearly written and not ambiguous. He knew he had been more than 90 or 180 days delinquent on that debt since its inception.

Based on his conduct in the Navy and at the substance abuse treatment center, as well as his failure to disclose requested information on the SF-86, the Government also established a potential disqualification under PC DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations*). All of these incidents involved behavior that violated established rules.

I reviewed all of the mitigating conditions under this guideline, in particular one of them, and conclude it does not apply. Although the falsifications were made in 2000, Applicant falsified six questions, which is not construed to be an isolated incident. Nor is there any evidence indicating he volunteered the correct information prior to the interview with the Government. Hence, Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) does not apply.

#### Guideline F: Financial Considerations

Under this guideline a security concern may exist when an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. The Government established a potential disqualification under Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1 (*A history of not meeting financial obligations*), and FC DC E2.A6.1.2.3 (*Inability or unwillingness to satisfy debts*). Applicant admitted he owes the delinquent debts referenced in the SOR, one of which relates to a 1994 car loan, and was unable to pay them.

I reviewed all of the mitigating conditions, in particular Financial Consideration Mitigating Condition (FC MC) E2.A6.1.3.6 (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*), and conclude it applies. Applicant submitted documentation that in August 2005 he entered into an agreement to make monthly payments on the outstanding judgment. He also paid some money on the cable bill and resolved the hospital bill. Hence, he has initiated a good-faith effort to resolve his debts.

#### The "Whole Person" Concept

In addition to considering the disqualifying and mitigating conditions under the guidelines, I also considered this case in light of the "whole person" concept. Applicant was 21-22 years old when he was convicted of numerous charges in the Navy and received an OTH. He was 29 years old when he was terminated from a position for sexual misconduct and 30 years old when he intentionally falsified his SF-86 application. This conduct, occurring over a period of ten years, connotes a pattern of immaturity and lack of judgment. Although he now professes remorse and behavioral changes, he presented little evidence to substantiate his claim or mitigate that pattern as evidenced in the SF-86, wherein he concealed significant information. If he had been more candid and trustworthy, he may have opted to disclose his history rather than not. Considering all of the facts and circumstances, and my uncertainty as to whether similar conduct could recur in the future, I conclude Applicant did not mitigate the security concerns arising from his criminal and personal conduct. He did mitigate those concerns raised by his financial problems.

### **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 as follows:

Paragraph 1: Guideline J (Criminal Conduct) AGAINST APPLICANT

Subparagraphs 1.a through 1.g: Against Applicant

Paragraph 2: Guideline E (Personal Conduct) AGAINST APPLICANT

Subparagraphs 2.a through g: Against Applicant

Paragraph 3: Guideline F (Financial Considerations) FOR APPLICANT

Subparagraphs 3.a. through 3.d: For Applicant

**DECISION**

In light of all of 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.

Shari Dam

Administrative Judge