

DATE: December 22, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-08352

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

James F. Maus, Esq.

**SYNOPSIS**

Applicant had numerous drunk driving convictions between 1996 and 2000. He no longer drinks, but he was convicted of prostitution in 2003. He has not told his wife of the prostitution conviction. Applicant failed to mitigate criminal conduct and sexual behavior security concerns. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 28 January 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision <sup>(1)</sup>-security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 23 February 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 27 June 2005. On 13 September 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 27 September 2005.

**FINDINGS OF FACT**

Applicant is a 61-year-old laborer-material handler for a defense contractor. He served in the U.S. Air Force between 1963 and 1967, when he was honorably discharged. During his military service, he held a security clearance. Ex. 1 at 9. He retired from federal civil service after working for the Department of the Army for 25 years.

Applicant was arrested in January 1966 for driving under the influence of liquor (DUI). In 1969, he was arrested for disturbing the peace by exposing himself. Applicant had too much alcohol to drink and urinated in public view. He was convicted of this offense and fined. In 1972, Applicant was convicted of DUI. He was sentenced to probation for one year and fined. He was convicted of DUI in 1974, and was again sentenced to probation for one year and fined. He was arrested in June 1975 of DUI. He was arrested in June 1984 and April 1987 for DUI. He was convicted of both offenses.

In April 2000, Applicant was arrested for aggravated DWI. Applicant failed some field sobriety tests, refused to take others, and declined to take a breath test. In February 2001, Applicant pled guilty to, and was convicted of, aggravated driving while under the influence of alcohol (refused to submit to chemical testing). The court found it was Applicant's third conviction for DUI. He was sentenced to 364 days in jail with 274 days suspended, fined, and placed on unsupervised probation. Applicant has not consumed alcoholic beverages since he was incarcerated.

Shortly after Applicant was hired by the defense contractor, he was required to complete an Electronic Personnel Security Questionnaire SF 86 Worksheet. Ex. A. In Module 24, Applicant was asked if he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant stated "yes," and listed a driving while intoxicated offense that occurred in the early 1980s. Next to the offense (DWI) Applicant put the number "8." In the remarks section, module 43, Applicant stated that he had been arrested approximately eight times for DWI, but did not remember all of the dates or places. Ex. A at 28.

On 20 September 2002, Applicant was provided with a printout of an electronic security clearance application that was supposed to contain the materials he submitted in his SF 86 worksheet. On the final page, Applicant certified that his answers were "true, complete, and correct" to the best of his knowledge and belief and acknowledged that any willful false statement could be punished by a fine and/or imprisonment under 18 U.S.C. § 1001. Ex. 1 at 14. Question 24 asked if Applicant had ever been charged with or convicted of any offenses related to alcohol or drugs. The answer on the SCA is "yes," and lists only a 1980 conviction for DWI. Ex. 1 at 7.

In May 2003, Applicant was arrested in an undercover prostitution sting. He "offered and/or agreed to pay a fee to engage in sexual conduct with the officer." Ex. 2 at 5. Applicant pled guilty and was convicted of prostitution. Tr. 27. He was placed on probation for one year, fined more than \$400, and ordered to perform 30 hours of community service. He has not told his wife about this offense. Answer; Tr. 27.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## CONCLUSIONS

### **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged Applicant was convicted of prostitution in October 2003 (¶ 1.a); convicted of aggravated DWI in February 2001 (¶ 1.b); convicted in December 1987 of DUI (¶ 1.c); convicted in 1984 of DUI (¶ 1.d); arrested in 1975 of DUI (¶ 1.e); convicted on DUI in 1974 (¶ 1.f); convicted of DUI in August 1972 (¶ 1.g); convicted in August 1969 of disturbing the peace by exposing himself (¶ 1.h); and arrested in January 1966 for DUI (¶ 1.i). Applicant admitted each of the allegations. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government's evidence established potentially disqualifying conditions under Guideline J. Applicant engaged in a series of criminal offenses. DC E2.A10.1.2.1, E2.A10.1.2.2. From 1966 until 2000, Applicant drove while under the influence of alcohol on many occasions. In 2003, Applicant was convicted of prostitution. Most of Applicant's offenses were alcohol related. Applicant has not established any mitigating conditions. He asserts that he no longer consumes alcoholic beverages and he has not done so since his last DUI in 2000. Even so, his new-found sobriety did not end his involvement in criminal acts. After considering all of the evidence, I find against Applicant.

### **Guideline D-Sexual Behavior**

In the SOR, DOHA alleged Applicant was convicted of prostitution in 2003 (¶ 2.a) and his wife does not know about it (¶ 2.b). Applicant denies both allegations, although he admits the conviction. Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion. Directive ¶ E2.A4.1.1.

The Government's evidence establishes potentially disqualifying conditions under Guideline D. Applicant engaged in sexual conduct of a criminal nature (DC E2.A4.1.2.1) and of a public nature that demonstrates a lack of discretion and judgment (DC E2.A4.1.2.4). Because Applicant has refused to tell his wife about his prostitution conviction, he remains vulnerable to exploitation. DC E2.A4.1.2.3. An applicant may mitigate sexual behavior security concerns when there is no other evidence of questionable judgment, irresponsibility, or emotional instability. MC E2.A4.1.3.3. This mitigating condition does not apply as Applicant has a lengthy history of questionable judgment and irresponsibility-his numerous DUIs. None of the other mitigating conditions apply. I find against Applicant.

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by failing to disclose all of his alcohol or drug related arrests (¶ 3.a). Applicant denies the allegation. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

After carefully reviewing all of the evidence, I find the Government's evidence does not establish any potentially disqualifying conditions under Guideline E. It is a disqualifying condition to deliberately omit, conceal, or falsify relevant and material facts on any SCA. DC E2.A5.1.2.2. The evidence established that Applicant was truthful and forthcoming on his EPSQ Worksheet in disclosing his DUIs. His employer's security personnel who were responsible for putting the information into electronic form apparently failed to correctly copy all of the entries from the worksheet. Although Applicant should have reviewed the electronic form more carefully, I find he did not deliberately falsify or attempt to mislead the Government in the investigation of his security clearance. I find for Applicant on ¶ 3.

## **FORMAL FINDINGS**

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Paragraph 2. Guideline D: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline E: FOR APPLICANT

Subparagraph 3.a: For Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

JAMES A. YOUNG

Administrative Judge

1. As required by Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).