

DATE: September 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-08806

## **DECISION OF ADMINISTRATIVE JUDGE**

**MARC E. CURRY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Department Counsel

#### **FOR APPLICANT**

*Pro se*

### **SYNOPSIS**

Applicant omitted material information from a security clearance application executed in 2002. His explanations for these omissions, provided at the hearing, were either specious, misleading, or inconsistent with explanations offered earlier during the investigative process. Clearance is denied.

### **STATEMENT OF THE CASE**

On September 30, 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. 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). The SOR alleges security concerns under Guideline E for personal conduct, and Guideline K for security violations. Applicant answered the SOR on October 31, 2005, denying all of the allegations, and requested a hearing.

The case was assigned to me on March 20, 2006. DOHA issued a notice of hearing on April 14, 2006, scheduling the hearing for May 11, 2006. I conducted the hearing as scheduled. Department Counsel submitted 41 exhibits and Applicant submitted 4 exhibits for admission. I admitted 30 of Department Counsel's exhibits into the record, <sup>(1)</sup> and denied 11 of them. <sup>(2)</sup> I admitted all of Applicant's exhibits into the record. I also received the testimony of the Applicant.

At the close of the hearing, Department Counsel submitted a trial brief. I left the record open to June 5, 2006, to allow Applicant an opportunity to prepare a written reply. Subsequently, Applicant prepared a reply brief on June 2, 2006. DOHA received the transcript (Tr.) on May 24, 2006.

### **RULINGS ON EVIDENCE**

Applicant objected to Exhibits 1-7, 10-12, 14-30, 32-36, and 38-41. He did not object to Exhibits 8-9, 13, 31, and 37, whereupon I admitted them.

Applicant contended that the remaining exhibits concerned issues that either: 1) already had been adjudicated in 1986; 2) related to allegations that were not charged in the SOR; or 3) were generally irrelevant. Because no record had been developed with which to evaluate the admissibility of these exhibits at that point of the hearing, I reserved judgment on their admissibility, and instructed Department Counsel to proffer each exhibit individually as he presented his case-in-chief. Department Counsel then called Applicant to testify, and argued for the admissibility of each exhibit in the context of Applicant's testimony.

After considering Department Counsel's subsequent proffer of these respective exhibits and Applicant's renewed objections, I concluded that Applicant's argument for excluding exhibits 3, 10, 16, 27-30, 32-33, and 38-40 were based upon probative value rather than admissibility. Consequently, I overruled these objections, and admitted them.

Applicant raised the *res judicata* argument with respect to the admissibility of Exhibit 4, a statement completed in 1980, Exhibit 5, a statement completed in 1984, Exhibit 10, U.S. Army Central Personnel Security Clearance Facility Records, dated August 1, 1980, Exhibit 11, a cover letter and resume Applicant wrote to a prospective employer in April 1982, Exhibit 12, a letter from Applicant to DOHA relating to a discovery dispute in the 1986 case, dated March 12, 1986, and Exhibit 15, Applicant's W-2 Statement from tax year 1985. Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action."<sup>(3)</sup> Here, Applicant never provided documentation to support his claim that the government's proposed, pre-1986 exhibits involved issues that were adjudicated in his favor in the 1986 security clearance hearing. Absent any documentation of these issues, Applicant's *res judicata* claim lacks merit. Moreover, "[a] favorable security clearance decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances."<sup>(4)</sup> Therefore, if the government concludes that an applicant's security clearance-worthiness should be reevaluated because of conduct after an issuance of the security clearance, it can consider both the subsequent conduct, and any derogatory conduct that preceded the issuance of the original security clearance in the reevaluation.<sup>(5)</sup>

Although the doctrine of *res judicata* does not restrict the admission of evidence that preceded an earlier, favorable security clearance investigation, the proposed evidence still must be relevant to be admitted.<sup>(6)</sup> Upon evaluating the admissibility of the pre-1986 exhibits, I concluded that Exhibits 5, 10, and 15 were relevant, and admitted them. Conversely, I concluded that Exhibit 4, and Exhibits 11-12 were not relevant, and sustained Applicant's objections.

Applicant argued that Exhibits 1-2, 14, 17-26, 34-36, and 41 were inadmissible because they related to issues that were not alleged in the SOR. In response, Department Counsel acknowledged that they were not alleged in the SOR. He contended, however, that Exhibits 2, 17-19, 21-24, 26, and 41 were admissible because they represented additional acts of dishonesty similar to those alleged in the SOR, and Exhibits 1, 14, 20, 25, and 34-36 were admissible because they demonstrated a history of financial difficulties that motivated Applicant to lie about material facts in a 2002 civil lawsuit, as alleged in subparagraphs 1.e. and 1.f.

Uncharged acts of misconduct can be considered in evaluating an applicant's credibility.<sup>(7)</sup> Here, Department Counsel clearly established a relationship between the issue of Applicant's credibility and the admissibility of Exhibits 2 and 41. Accordingly, I admitted them. Although Department Counsel also established a similar relationship between the issue of Applicant's credibility and the admissibility of Exhibits 17-19 and 21-24, it was tenuous at best. I admitted them, but gave them minimal consideration in reaching my ultimate conclusion. Department Counsel did not establish any relationship between the issue of Applicant's credibility and the admissibility of Exhibit 26. Consequently, I sustained Applicant's objection.

Although Department Counsel was seeking to admit Exhibits 1, 14, 20, 25, and 34-36 to demonstrate financial problems that Applicant was experiencing in 2002, these proffered exhibits set forth Applicant's financial history from 1987 to 2005. In that the government did not allege *any* SOR allegations under the financial considerations guideline, Applicant was not on notice that his finances were going to be at issue at the hearing. I sustained his objection to these exhibits.

## FINDINGS OF FACT

After a complete review of the evidence, I make the following findings of fact.

Applicant is a 60-year-old married man with one adult child. He earned a Ph.D. in Physics in 1971, and has been working as a research scientist for his employer since 1991. Throughout his career, he has received several commendations for outstanding performance. [\(8\)](#)

In August 1991, after accepting the offer to work for his current employer, Applicant placed much of his personal property in storage in the city where he was to begin working. After relocating approximately one year later, he attempted to retrieve his personal property, and discovered that the storage warehouse had flooded, ruining the majority of it.

In 1993, Applicant filed an insurance claim for approximately \$90,000. The insurance company reviewed the claim and discovered that Applicant appeared to have overvalued the cost of the replacement inventory by approximately \$80,000. In doing so, he allegedly listed several books that had not been published when he placed the property in storage, and listed some lost business inventory for a nonexistent business.

The insurance company notified the police who conducted an investigation. Applicant told the investigator that the flood destroyed, among other things, 2,000 out-of-print, irreplaceable books. Applicant also contended that when he asked the original claims adjuster what happened to the books, he told him to buy alternative, replacement books, and bill the insurance company for the cost. Also, Applicant told the investigator that the alleged, nonexistent business was actually his wife's business.

The investigator interviewed the original claims adjuster who confirmed Applicant's contention. After the investigator subsequently confirmed that the destroyed property claimed as lost business inventory actually did relate to a business of Applicant's wife, the police declined to press charges.

Upon leaving work on the evening of August 18, 1998, Applicant did not properly engage the electronic lock to the entry and exit door of a closed area before setting the alarm, causing it to go off ten minutes after he left the building. [\(9\)](#) His employer conducted an investigation and concluded that he failed to follow the proper procedure for securing a closed area, but that no compromise of classified information occurred. [\(10\)](#) Applicant's employer reprimanded him at the conclusion of the investigation.

On June 2, 1999, Applicant again left work at the end of the day without following the proper procedures for securing the door to a closed area. This time, his employer placed him on probation, and prohibited him from locking the facility at the end of the business day for the duration of the time he worked at the facility. [\(11\)](#) Also, his employer decided not to submit his top-secret clearance, which he held at the time, for renewal. [\(12\)](#) Applicant transferred out of the facility an unspecified time later. [\(13\)](#) He has not committed any security violations since the 1999 incident. [\(14\)](#)

In a signed, sworn statement executed in 2004, Applicant stated "I have never been involved, or suspected, or accused of the improper handling or compromise of sensitive or classified information." [\(15\)](#) At the hearing, he testified that he did not consider the two incidents in the late 1990's to be security violations because he disagreed with his employer's findings, did nothing wrong, and did not compromise anything. [\(16\)](#)

In November 1999, Applicant executed a written promissory note with an individual for \$279,000. The individual had financed the purchase of Applicant's home seven years earlier, and the \$279,000 represented the balance of a secondary mortgage on the property. Under the terms of the note, Applicant was to have satisfied it by December 2000.

Applicant did not satisfy the note as promised, prompting the individual, in November 2001, to sue him for breach of contract. Applicant countersued claiming that he and the individual had entered into an oral agreement after the execution of the promissory note, in which he agreed to provide statistical and managerial consulting to the individual in support of an oil-drilling venture. Under the alleged agreement, the promissory note was to be canceled if the

individual's venture was successful.

Applicant alleged that the individual informed him of the success of the venture, and acknowledged his contribution to the project, but failed to release the promissory note in consideration for his consulting services. In an affidavit attached to a subsequent pleading, Applicant mischaracterized his relationship with his primary employer as a consultant rather than an employee.<sup>(17)</sup> In the same pleading, Applicant attached a resume that failed to list his employer altogether.<sup>(18)</sup>

The case settled in March 2003.<sup>(19)</sup> According to its terms, Applicant was to pay the individual \$18,500 through \$500 monthly increments. He disclosed these settlement terms in a signed sworn statement executed in June 2003.<sup>(20)</sup>

On March 12, 2000, Applicant completed a security clearance application (SF 86). In response to Question 6: *(List your employment activities, beginning with the present and working back 10 years. You should list 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 failed to disclose a company for whom he had provided consulting services in early 2000. At the hearing, Applicant explained that he did not list this company because their relationship was limited to "preliminary discussions about what [he] could prospectively do for them."<sup>(21)</sup> Also, when asked at the hearing if there was an agreement to compensate him, he replied, "[o]f course not."<sup>(22)</sup> In Applicant's signed, sworn statement of February 2004, he stated that he worked 50 hours as a consultant for the company in early 2000 under an agreement in which he was to be paid \$200 per hour through a combination of cash and stock options.<sup>(23)</sup>

In response to Question 32: *(Your Investigation Record - Clearance Actions To your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked, or have you ever been debarred from government employment?)*, Applicant failed to disclose that his eligibility for access to sensitive compartment information (SCI) was denied in June 1980.<sup>(24)</sup> He omitted this information because he believed that the issue of eligibility for access to SCI was outside the scope of an ordinary security clearance renewal, and should not be addressed on a security clearance application.<sup>(25)</sup> Also, he stated that "special access is denied for many reasons which have little to do with an applicant's eligibility for clearance" such as the need of the employer at the time, or the policy of the granting agency.<sup>(26)</sup> Applicant's special access application was denied due to financial problems.<sup>(27)</sup>

Applicant also failed to disclose a \$334 tax lien filed against him in November 1993<sup>(28)</sup> in response to Question 36: *(Your Financial Record - Tax Lien In the last 7 years, have you had a lien placed against your property for failing to pay taxes or other debts?)*. He did not list the tax lien because he disagreed with its imposition, and considered it to be dormant because the state that filed it, "had done nothing about it."<sup>(29)</sup>

In approximately June 2005, the government propounded a set of interrogatories to Applicant in which he was asked, among other things, to list the companies with whom he consulted, in addition to the dates of the consultations, a description of the services provided, and any compensation received.<sup>(30)</sup> Applicant provided this information as required.

## 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 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 guidelines most pertinent to an evaluation of the facts of this case:

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

**Security Violations - Guideline K:** Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to 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 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." [\(31\)](#) In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 trustworthiness determination.

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 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

### **Personal Conduct**

Upon considering all of the SOR allegations, I conclude that subparagraph 1.a. and 1.h. do not generate security concerns. With respect to subparagraph 1.a., the police investigated Applicant in 1995 for allegedly filing a false insurance claim; however, they closed the case after concluding that he filed it consistent with a claims adjuster's instructions. Subparagraph 1.h. alleges that Applicant falsified his response to interrogatories in 2005 by failing to disclose the terms of his consultations with clients, when none of the interrogatories explicitly requested this information.

The remaining allegations raise 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), and PC DC E2.A5.1.2.5 (A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency), apply.*

Throughout the investigative process, Applicant provided evasive, misleading, and contradictory explanations for his SF 86 omissions. Also, he withheld adverse information with which he disagreed, such as the imposition of a tax lien in 1993, and his employer's conclusion that he mishandled classified information on two occasions in the late 1990s. Applicant had a legal obligation to provide complete and accurate information. Consequently, the fact that he took exception to the outcome of these matters did not negate his responsibility either to list them, as required on the SF 86, or to acknowledge them when confronted by an investigator.

Applicant's misrepresentations regarding his employment that he submitted with a pleading filed in a state court civil matter demonstrate that his propensity to falsify material information was not limited to the security clearance investigative process. The primary issue in the civil case involved whether Applicant and the plaintiff had entered into an oral agreement for Applicant to provide consulting services to the plaintiff in exchange for the release of a promissory note. In an effort to "establish [his] competence to give technical advice," <sup>(32)</sup> Applicant attached a resume and an affidavit describing his consulting expertise. If these attachments had simply emphasized his consulting experience without excluding the fact that his primary job did not involve consulting, their submission would have been within the bounds of legitimate trial advocacy. Applicant, however, deleted any reference to his principal employer from his resume, and mischaracterized his employer as a client in his affidavit, creating the impression that he was a full-time consultant. These submissions constitute examples of duplicity rather than legitimate trial advocacy.

Consequently, I conclude Applicant's explanations for failing to disclose material information during the investigative process, and for submitting misleading information to a civil court pursuant to a 2001 lawsuit were not credible. PC DC E2.A5.1.2.2 and PC DC E2.A5.1.2.5 apply to the remainder of the Personal Conduct allegations without mitigation. His personal conduct remains a security concern.

### **Security Violations**

Applicant committed two security violations by failing to secure a door to a closed area on two occasions in the late 1990s. Security Violations Disqualifying Condition (SV DC) E2.A11.1.2.2 (*Violations that are deliberate or multiple or due to negligence*) applies.

Both violations were minor and inadvertent. Applicant has not committed a security violation since 1999. Security Violations Mitigating Condition (SV MC) E2.A11.1.3.1 (*Were inadvertent*) and SV C E2.A11.1.3.2 (*Were isolated or infrequent*) apply. Applicant has mitigated the security violations security concern.

### **Whole-Person Concept**

Upon evaluating the totality of Applicant's conduct in light of the whole-person concept, I conclude that he is an individual who values self-promotion and self-preservation over honesty. Such an individual should not have access to classified information.

## **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: AGAINST APPLICANT

Subparagraph 1.a.: For 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.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline K: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For 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. Exhibits 2-3, 5-10, 13, 15-19, 21-24, 27-33, and 37-41.
2. Exhibits 1, 4, 11-12, 14, 20, 25-26, and 34-36.
3. *Allen v. McCurry*, 449 U.S. 90, 92 (1980).
4. ISCR Case No. 00-0519 at 2 (App. Bd. Dec. 7, 2001).
5. *Id.*, Directive Sec. 6.3; ¶¶ E2.2.1, and E2.2.3.
6. Directive ¶ E3.1.19.
7. ISCR Case No. 98-0582 at 9 (App. Bd. Nov. 12, 1999).
8. Tr. at 147.
9. When containers or vaults are insufficient to store classified material due to either the size or the nature of the classified material, the contractor must designate a closed area to store it (National Industrial Security Program Operating Manual, Section 5-306). Closed areas must be secured by locked doors supplemented by an alarm system.
10. Exhibit 28, Employer Investigation, dated August 24, 1998, at 2.
11. Tr. at 100.
12. Exhibit 8, Statement of Applicant, dated June 26, 2003, at 11.
13. *Id.*

14. Tr. at 146.

15. Exhibit 9, Statement of Applicant, dated February 27, 2004, at 8.

16. Tr. at 102.

17. Applicant's Declaration in Support of Response to Motion for Summary Judgment, dated May 18, 2002, at 1, as included in Exhibit 30, Court Records at 50.

18. *Id.* at 54.

19. Exhibit 31, Settlement Agreement, dated March 28, 2003.

20. *See* note 12, *supra* at 4.

21. Tr. at 50.

22. *Id.*

23. *See* note 15, *supra* at 4.

24. Exhibit 5, Statement of Applicant, dated December 4, 1984, at 4.

25. Answer, dated October 31, 2005, at 2.

26. *Id.*; Tr. at 39.

27. *See* note 12, *supra* at 9.

28. Exhibit 32, Credit Bureau Report, dated July 15, 2000, at 2.

29. Tr. at 74.

30. Exhibit 37, Applicant's Response to Interrogatories, dated July 8, 2005, at 8.

31. *See generally*, Directive, Sec. 2.3., Sec. 2.5.3., Sec. 3.2., and Sec. 4.2.

32. *See* note 25, *supra* at 3.