

DATE: November 30, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-11410

**DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

**APPEARANCES**

**FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 45-year-old manufacturing engineer who has worked for a federal contractor since 1984. Applicant falsified information on his security clearance application regarding his drug history and criminal conduct. Applicant failed to mitigate the security concerns under Guideline E, personal conduct, and Guideline J, criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On June 14, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E, personal conduct, Guideline J, criminal conduct, and Guideline H, drug involvement.

In a sworn statement dated July 19, 2005, Applicant responded to the SOR allegations, admitting all the allegations, except subparagraph 1.a. Applicant elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on September 2, 2005. The FORM was received by Applicant on September 7, 2005. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did not provide additional material. The case was assigned to me on October 13, 2005.

**FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is a 45-year-old manufacturing engineer who has worked for a defense contractor since 1984. He is a college graduate, married for 18 years, and has two children, 16 and 14 years old.

Applicant was arrested on November 23, 1978, and charged with larceny. He was found guilty and fined \$90.00. Applicant was 18 years old and went to a new housing development and stole lumber.

Applicant was arrested on August 22, 1999, and charged with Simple Assault Domestic Violence. Applicant and his wife had an altercation and the police were called. Both were arrested and the charges were later dismissed.

Applicant was arrested on March 10, 2000, and charged with (1) Possession of Controlled Dangerous Substance-Cocaine, (2) Possession of Drug Paraphernalia, (3) Driving Under the Influence of Alcohol (DUI), (4) Disregard for Marked Lanes, (5) Reckless Driving, (6) No Insurance and (7) Consumption of Alcohol by Operator. Applicant was found guilty of Count (3), DUI, and sentenced to a \$556.00 fine, ordered to attend an alcohol awareness class, pay \$1,000 a year for three years to the Intoxicated Driver Resource Center, and his driver's license was suspended for 180 days. He was also found guilty of Counts (1) and (2), and sentenced to a \$706.00 fine and placed on conditional discharge probation for one year. Counts (4) and (7) were dismissed. Applicant admitted to police officers that he was depressed because of a pending divorce so he went out drinking with some friends. While out he snorted cocaine through a five dollar bill that was later seized from him

Applicant was arrested on October 5, 2002, and charged with Simple Assault Domestic Dispute. Applicant arrived home five hours late from a day of golfing. He had been drinking alcohol. He and his wife argued and it escalated into a physical altercation. Applicant's physical actions caused his wife to be injured and the police were called. His wife later declined to pursue the charges and they were dismissed. Applicant and his wife went to marriage counseling and remain married.

Applicant used cocaine, with varying frequency, in the late 1970's or early 1980's. He resumed using cocaine approximately twice a year from 1994 to at least arch 2000. Applicant was 34 years old when he resumed using drugs. Applicant claims he has not used drugs since March 2000, the date he was arrested and charged with drug possession and DUI. Applicant contributed money to purchase cocaine. Applicant used marijuana, with varying frequency, in at least 1977.

Applicant filled out his security clearance application (SCA) on September 10, 2002. He answered "No" to Question 26 (*Your Police Record-Other Offense-In the last 7years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.*) Applicant deliberately failed to divulge he had been arrested and charged on August 22, 1999 with Simple Assault Domestic Violence.

Applicant answered "No" to Question 27 (*Your Use of Illegal Drugs and Drug Activity-Illegal Use of Drugs-Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?*). Applicant deliberately provided a false answer to this question. Applicant had used cocaine, from at least 1995 to March 2000 in varying frequency. He admitted that he did not report his cocaine use because "I felt such was sporadic and infrequent. I thought revelation of such would hinder my chances in obtaining my security clearance."<sup>(2)</sup>

Applicant's deliberate falsifications on his SCA were in violation of Title 18 U.S.C. § 1001, a felony.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline E, personal conduct considerations, Guideline H, drug involvement, and Guideline J, criminal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision

based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these 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. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(5)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.<sup>(6)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(7)</sup>

No one has a right to a security clearance<sup>(8)</sup> and the "clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(9)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(10)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(11)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. 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.

Guideline H-Drug Involvement is a security concern because improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

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

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guidelines E, J, and H.

Based on all the evidence, 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.A5.1.2.4 (*Personal conduct or concealment of information that increases an individual vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*), apply in this case. Applicant deliberately concealed an arrest and his past drug history. Applicant thought divulging this information would hurt his chances of getting a security clearance.

I considered all the mitigating conditions and specifically considered 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*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant falsified his SCA. He did not provide the correct information until confronted by an investigator. Applicant's intent was to hide important information that might hurt his chances of obtaining a clearance. Applicant admits he is embarrassed by his past drug involvement. Applicant does not provide an explanation for why he failed to divulge his August 1999 arrest for Domestic Violence. The falsification is recent because it is a part of his SCA, and was not isolated because he lied on two questions and failed to divulge the accurate information before being confronted by an investigator. Applicant has not provided any evidence to show he has taken positive steps to reduce his vulnerability to coercion or exploitation. One objective of the security clearance process is determine all relevant and material information concerning an applicant. The process requires full and open disclosure by the applicant of all requested information. Any intentional misrepresentation or omission by an applicant materially obstructs the investigation of Applicant's security worthiness and raises serious concerns about the character and overall integrity of the individual.

Based on all the evidence 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 charges*) apply. Applicant was found guilty of DUI, possession of cocaine and drug paraphernalia. Applicant was also arrested twice for domestic violence. Applicant's deliberate falsification on his SCA is a felony violation. Applicant's drug activity is thoroughly discussed under the disqualifying and mitigating conditions relating to Guideline H, drug involvement.

I considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.10.1.2.1 (*The conduct was not recent*); CC MC E2.10.1.2.2 (*The crime was an isolated incident*); CC MC E2.10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*); and CC MC E2.10.1.3.6 (*There is clear evidence of successful rehabilitation*). It appears Applicant's domestic violence issues have been resolved and I find these incidents were not recent, are not likely to recur, and because Applicant and his wife have gone to counseling, there is clear evidence of successful rehabilitation. The allegations in this regard are mitigated.

Regarding Applicant's other criminal arrests and convictions, although it is likely Applicant will not use drugs again, I find his intentional and deliberate act of falsifying information on his SCA, a criminal act, to be the major factor in his failure to mitigate the security concern under this guideline. Applicant willingly lied to hide his past, despite swearing that the information he was providing was true. His actions are too recent and serious to mitigate. I find Applicant failed to mitigate this security concern.

Based on all the evidence, Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse* <sup>(12)</sup>), and DI DC E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*) apply. Applicant used cocaine in the late 1970's or early 1980's, and from 1994 to March 2000. He contributed to the purchase of cocaine for his own use. He also used marijuana in at least 1977, and used cocaine in March 2000, before he was arrested for possession of the drug and DUI.

I considered all the mitigating conditions and especially considered Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1 (*The drug involvement was not recent*); DI MC E2.A8.1.3.2 (*The drug involvement was an isolated or aberrational event*); DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*); and DI MC

E2.A8.1.3.4 (*Satisfactory completion of a prescribed drug treatment program including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.*) Applicant's last use of cocaine was in March 2000, and he claims he does not plan on using it again. I find DC MC E2.A8.1.3.1 applies because the activity was over five years ago. I find DC E2.A8.1.3.2 does not apply. Applicant's history of drug use spans decades, but his most recent is of concern. At the age of 36, married, with young children, Applicant resumed actively using cocaine and continued to do so until he was accosted by law enforcement. Applicant has not presented any evidence that he attended a drug treatment program or has done anything regarding rehabilitation. Applicant claims he will not use drugs in the future, but the concern is that his last activity was not as a youthful offender, but as an adult with responsibilities. However, because it has been five years, I find Applicant has demonstrated an intent not to use drugs again. I find Applicant has mitigated the security concerns regarding his drug involvement.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person and I find Applicant failed to mitigate the security concerns regarding his personal conduct and criminal conduct. Applicant's concealment and disregard for the truth is a grave and serious concern that reflects poorly on his character and judgment. Therefore, I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guidelines H is decided for Applicant and Guidelines E and J are decided against Applicant.

### **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: Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

#### Paragraph 2: Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. For the Applicant

Subparagraph 2.d. For the Applicant

Subparagraph 2.e. Against the Applicant

#### Paragraph 3: Drug Involvement (Guideline H) FOR THE APPLICANT

Subparagraph 3.a. For the Applicant

Subparagraph 3.b. For the Applicant

Subparagraph 3.c. For the Applicant

Subparagraph 3.d. For 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.

Carol. G. Ricciardello

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. Item 5 at 8.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
5. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
7. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
8. *Egan*, 484 U.S. at 531.
9. *Id.*
10. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
11. Executive Order 10865 § 7.
12. E2A8.1.1.2.1 defines drug abuse as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.