

DATE: August 28, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12556

## **DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 42 years old. He works for a defense contractor. His 1998 drug test in the Army reserves showed cocaine and marijuana use while holding a security clearance. He had several arrests between 1996 and 1999 for domestic assaults, but was acquitted of several charges. He also had civil contempt charges involving divorce decree enforcement issues. He deliberately falsified his 2002 security clearance application regarding his arrests, security clearance revocation, and drug abuse. Applicant mitigated the drug involvement and criminal conduct security concerns. He did not mitigate the personal conduct security concern. 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 August 31, 2005, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on October 11, 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on January 23, 2006.

On March 1, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. The Government moved to amend the SOR to add allegations and rearrange other allegations under different paragraphs. Applicant had no objection to the amendment. I granted the motion. Applicant admitted the new allegations on the record. (Tr. 6-12) DOHA received the hearing transcript (Tr.) on March 10, 2006.

### **FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of

fact:

Applicant is 42 years old has two children. He works for a defense contractor. Applicant was married from 1985 until his divorce in 2000. He started working for his employer in October 1999. Before that time he was self-employed in a bathroom fixture refinishing business with one of his half-brothers. That business failed, and as his marriage failed about the same time, Applicant filed Chapter 7 bankruptcy in November 2002. He was discharged in bankruptcy in March 2003. (Tr. 34, 48, 77, 78, 79; Exhibits 1, 3, D)

Applicant served in the Army Reserve from 1981 until 1999. His last enlistment expired in June 1999 as his commander was processing him for administrative discharge for drug abuse. The reason for this action was that on October 4, 1998, Applicant had tested positive for marijuana and cocaine during a command directed urinalysis. Applicant received a general discharge in the grade of Staff Sergeant. Applicant claims the only time he used cocaine and marijuana was on October 3, 1998, when he was with a group of friends who urged him to use it. The next day was the command directed urinalysis. His commander also processed him for revocation of his secret security clearance evidenced by a May 26, 1999, memorandum. No response from Applicant was received within the designated time, and therefore, on July 29, 1999, the Army revoked Applicant's security clearance. The notice of the intended revocation and the memorandum of revocation were addressed to Applicant at the military duty assignment he had in 1999. Applicant completed security clearance paperwork several times during his military career and was familiar with it. (Tr. 50-53; Exhibits 1, 3, 4, B)

When Applicant completed his security clearance application (SCA) on September 6, 2002, he deliberately did not list his drug use in 1998 in response to Question 27 (illegal use of any controlled substance in the past seven years), nor in response to Question 28 (any illegal use of controlled substances at any time while possessing a security clearance), nor in answer to Question 32 ("To your knowledge have you ever had a clearance or access authorization denied, suspended, or revoked?"). Applicant claims he did not know his clearance was revoked until 2006. He further claims he did not disclose his drug use on the SCA because he was "sidetracked" by business demands on his time by his employer when he was completing the SCA on the computer system. Applicant claims he wrote all the correct answers on a paper SCA, and then neglected to verify all his typed answers when he finished the electronic version, printed it, and signed it. The SCA contains certification language as part of the signature block that the signer admits the answers on the SCA are "true, complete, and correct to the best of my knowledge and belief and are made in good faith." The signer also admits that a "knowing and willful false statement on this form can be punished by fine imprisonment or both." Applicant signed the SCA. (Tr. 69-103; Exhibits 1, 3, C)

Applicant has five criminal arrests between 1996 and 1999, one mistaken arrest in 2000 on a charge previously adjudicated in his favor, and a civil contempt citation in 2002. These actions occurred because of altercations with Applicant's half-brothers and his estranged wife. Specifically, the offenses, dates, and dispositions are as follows:

A November 1996 arrest for theft of a television. The complaint was made against Applicant by one of his half-brothers;

A January 3, 1997, arrest for domestic battery against his wife upon her complaint. In court on March 18, 1997, upon the advice of his attorney, Applicant pled no contest to the charge of battery. He was sentenced to one year of probation, and ordered to pay court costs of \$50 and \$50 to his wife. Applicant and his wife had a history of domestic altercations dating back to the early days of their marriage, including Applicant hitting his wife in the nose in 1985;

On April 21, 1997, Applicant was arrested for violating his probation. His wife accused him of stalking her and the probation officer locked up Applicant for three days;

On July 23, 1999, Applicant was arrested on two counts of domestic battery involving a shoving match with his 18 year old half-brother resulting from Applicant's accusations that his half-brother was using his bathroom fixture business assets in a side business and not putting the income into Applicant's business. These charges and the November 1996 theft accusation by another half-brother were tried at the same time in December 1999. Applicant was found not guilty of all three charges. On April 19, 2000, in the next county to the one in which this trial was held, Applicant was arrested when the law enforcement computer system showed there were warrants still outstanding on these three charges. The next morning Applicant was released when the mistake was discovered;

Applicant was found in contempt of court in a civil proceeding brought by his former wife to collect Applicant's share

of medical expense insurance premiums. He was ordered to jail for three days. That sentence was stayed because at that time Applicant had filed Chapter 7 bankruptcy and all collections were stayed. Applicant was to pay \$116 monthly on this debt to his former wife, but upon advice of his bankruptcy attorney paid nothing until discharged in bankruptcy in March 2003. On May 9, 2003, Applicant returned to court, had not paid his portion of the insurance premiums by that time, instead offering his wife \$100 as the first payment on the arrearage. That amount did not satisfy his former wife or the judge, and, so he was ordered to jail. His mother paid the insurance premium arrearage of \$1,305 and Applicant was released from jail.

(Tr. 54-81; Exhibits 1-3, 5-10, A, D, E, F)

Applicant deliberately did not answer Question 26 on his SCA (In the past seven years, have you been arrested for any offense not otherwise disclosed on the SCA) by disclosing his 1997 domestic battery arrest resulting from the fight with his wife, his 1997 probation violation incarceration, nor his 1999 domestic battery arrest from his half-brother's complaint. (Tr. 69-72, 92-103; Exhibit 1)

Applicant's supervisors and military security officer regard Applicant as having a very good work ethic. His supervisor considers Applicant's work product to be excellent. (Tr. 29-43; Exhibit B)

Applicant moved away from his former wife and his half-brothers after the series of altercations. He lives at least 60 miles from them. He arranged with his wife to pick up his children for visitation near her home and tries to avoid any conflicts with her. There have been no further arrests since 2003. (Tr. 56, 59, 85, 86)

### 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 has 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 the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with 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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

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. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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 that the applicant has not met the strict guidelines the

President and the Secretary of Defense have established 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. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

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:

Guideline H: Drug Involvement: *The Concern. 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. E2.A8.1.1*

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1*

Guideline E: Personal Conduct: *The Concern: 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. E2.A5.1.1*

## CONCLUSIONS

Regarding the drug involvement security concern, the Disqualifying Condition (DC) that applies is DC 1 (Any drug abuse, which is the illegal use of a drug. E2.A8.1.2.1). Applicant admitted his use of cocaine and marijuana on October 3, 1998.

The Mitigating Conditions (MC) that apply are MC 1 (The drug involvement is not recent. E2.A8.1.3.1) and MC 2 (The drug involvement was an isolated or aberrational event. E2.A8.1.3.2) Applicant drug use was a one time event in 1998. Therefore, I conclude this security concern for Applicant.

The criminal conduct security concern arose from DC 1 (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2). Applicant had a series of arrests for battery from 1996 to 1999 arising from family conflicts.

Those security concerns are mitigated by MC 1 (The criminal behavior was not recent. E2.A10.1.3.1), MC 5 (Acquittal. E2.A10.1.3.5), and MC 6 (There is clear evidence of successful rehabilitation. E2.A10.1.3.6). The contempt proceeding in 1999 arising from the fight with his brother over Applicant's business. He was acquitted of three criminal charges, the theft and domestic battery to his half-brother. His move away from his former residence into another county at least 60 miles away from his former spouse alleviated the interpersonal stresses that caused several other arrests. This change is clear evidence of Applicant's own realization and efforts to avoid further criminal activities. I conclude the MC outweigh the DC under this security concern, and find for Applicant under the criminal conduct security concern.

Regarding the personal conduct security concern, the deliberate falsification of the 2002 SCA and the civil court contempt proceedings show questionable judgment, untrustworthiness, and an unwillingness to comply with rules and

regulations. DC 1 (Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. E2.A5.1.2.1), DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2), and DC 5 (A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. E2.A5.1.2.5). The use of cocaine and marijuana while holding a security clearance in 1998 and deliberately failing to disclose that on the SCA, the two court proceedings including contempt findings by the state court when Applicant deliberately failed to comply with a court order to pay insurance premiums for his children, and the deliberate failure by Applicant to systematically disclose on his SCA any unfavorable information in answering Questions 26-28 and 32 while making specific answers on Questions 1 to 18, and 34 to the end of the SCA, shows a pattern of falsification.

Applicant's explanation that he was "sidetracked" is not credible or persuasive. His testimony about the computer system's verification of previous answers when he logged back into the SCA information he saved from a prior session, his testimony that he wrote the answers on paper and made mistakes in transcribing to the computer, his explanation he did not proof read it before he signed the SCA including the certification, taken as a whole show he deliberately excluded unfavorable information from the SCA. There are no MC to apply on these facts. I find also especially egregious is the fact Applicant had 18 years of military service, including completing SCAs in the past, and was an NCO when discharged. Based on that extensive experience he knew what he was doing when he failed to answer truthfully the SCA in 2002. I conclude this security concern against Applicant.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a: FOR Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

Subparagraph 3.c: Against Applicant

Subparagraph 3.d: Against Applicant

Subparagraph 3.e: Against Applicant

Subparagraph 3.f: For Applicant

Subparagraph 3.g: 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.

Philip S. Howe

Administrative Judge

1. Pursuant to 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).