

DATE: July 12, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-01777

## **DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Ray T. Blank, Jr., Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a 35 year old machinist employed by a defense contractor. In 1991 he was convicted on two counts of armed robbery and using a firearm in the commission of a felony. He was sentenced to a total of 16 years in confinement with five years suspended. He served eight years and was released on parole in 1999. Under the provisions of 10 U.S.C. §986, he is ineligible to hold a security clearance since he was incarcerated for over one year unless a waiver is granted by the Secretary of Defense. No information was submitted to justify a recommendation for such a waiver. Clearance is denied.

### **STATEMENT OF CASE**

On October 12, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement dated October 28, 2005, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on February 16, 2005. A complete copy of the file of relevant material (FORM) was provided to the Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did so and it was submitted on March 20, 2006. The case was assigned to me on April 10, 2006.

### **FINDINGS OF FACT**

Applicant is a 35-year-old employee of a defense contractor who works as a machinist in a shipyard. After a complete

and thorough review of the information in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant was arrested in January 1991 when he was 19 years old and charged with felony counts relating to two armed robbery offenses occurring in the same month against two pizza deliverymen. On July 24, 1991, he was convicted of two counts of robbery and two counts of use of a firearm in commission of the felonies. He was sentenced to 14 years of incarceration with five years suspended for one incident and seven years for a second. The net result was a sentence of 16 years of incarceration with five years suspended. He was actually incarcerated for eight years before being released on parole in February 1999. His probation ended in February, 2000.

In view of the fact that Applicant was incarcerated for a period in excess of one year, the provisions of 10 U.S.C. §986 preclude the grant of a security clearance absent the issuance of a waiver from the Secretary of Defense. No evidence was offered by Applicant to justify a recommendation for such a waiver. The Applicant filed one document after the FORM was submitted to him for comment with a specific invitation to offer such evidence. However, his response consisted only of a copy of the SOR with his signature on each page. His statement to the security investigator dated April 27, 2004, contains no information that could support the recommendation of a waiver.

### 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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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* Executive Order No. 12968 § 3.1(b)

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

Applicant's arrest and conviction for criminal conduct raises concerns under Guideline J (E2.A10.1.1) involving a history or pattern of criminal activity creating doubt about a person's judgment, reliability and trustworthiness. Conditions that could raise a security concern and may be disqualifying include allegations or admissions of criminal conduct whether the person was formally charged (E2.A10.1.2.1.), or a single serious crime or multiple lesser offenses (E2.A10.1.2.2.). The allegations concerning criminal conduct occurring in 1991 might be mitigated by the fact that it occurred over 15 years ago. (E2.A10.1.3.1.)

However, in view of the period of time Applicant served in confinement and the provisions of 10 U.S.C. §986, he is ineligible for a security clearance in the absence of a waiver from the Secretary of Defense. No evidence is in the file or has been submitted by Applicant to justify a recommendation for such a waiver.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. I have no evidence before me to evaluate the whole person. His record of arrest, conviction, and incarceration stand uncontested. No mitigating facts or circumstances relating to conduct since his release were offered. Only the date and age of the offenses might be considered as a mitigating consideration but that is insufficient to justify a recommendation for a waiver.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude the Applicant's actions and conduct precludes a finding that it is not clearly consistent with the national interest to grant a security clearance to him or to recommend a waiver to the Secretary of Defense.

### **FORMAL FINDINGS**

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

### **DECISION**

After full consideration of all the facts and documents 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.

Charles D. Ablard

Administrative Judge