

DATE: September 28, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-02581

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Sabrina E. Redd, Esq., Department Counsel

#### **FOR APPLICANT**

Robert F. Bethea, Esq.

### **SYNOPSIS**

Applicant is unable to explain, extenuate, or mitigate the security concern stemming from the false answer he gave when he completed his security-clearance application. Clearance is denied.

### **STATEMENT OF THE CASE**

Applicant is challenging the Defense Department's action to deny or revoke his security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on December 23, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its action. The SOR--which is in essence the administrative complaint--alleges security concerns under Guideline E for personal conduct (falsification) and Guideline J for criminal conduct. Applicant replied to the SOR on January 24, 2006, and indicated he wished to have a hearing.

The case was assigned to Administrative Judge Henry Lazzaro and a hearing was convened March 23, 2006. At Applicant's request, Judge Lazzaro granted a continuance. The hearing was rescheduled for June 12, 2006, but it did not take place because the then-assigned department counsel had travel-related problems. The case was reassigned to me July 30, 2006. The next month a notice of hearing was issued scheduling the hearing for August 24, 2006. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript from the March session on April 7, 2006, and received the transcript from the August session on September 11, 2006.

### **FINDINGS OF FACT**

Applicant denied the SOR allegations. In addition, after considering the record evidence as a whole, I make the following findings of fact.

1. Applicant is a 57-year-old married man. He has been married to the same woman since 1968. He has two adult children and five grandchildren.

2. For the last 36 years, he has worked in the field of naval technical documentation. He is seeking an industrial security clearance for the first time, although he held a security clearance for several years while serving in the military. For about the last 16 years, Applicant has been employed by a company engaged in defense contracting. He works as a manager of a technical library. As a manager, he has four employees reporting to him. His annual salary for 2005 was between \$55,000 and \$60,000.

3. Before his current employment, Applicant served as a Sailor in the U.S. Navy from January 1969 until his honorable discharge and retirement in October 1989. He retired at the pay grade of E-6 and grade of petty officer first class.

4. In 1994, and again in 1997, Applicant was arrested and charged with drug-related offenses. He did not disclose either incident when he completed a security-clearance application in December 2003. His nondisclosure is the basis for the SOR's falsification allegation.

5. On or about July 30, 1994, Applicant picked up a young woman and offered to give her a ride. While doing so, he was stopped by police for a minor traffic violation. The police officer recognized the woman as a prostitute and asked Applicant if he knew she was a prostitute, to which he denied. When the woman got out of the car her purse spilled revealing drug contraband. Applicant was arrested for two drug-related offenses: (1) possession of marijuana; and (2) possession of narcotic equipment (Exhibit 2). He was taken to a local jail and placed in a holding cell until his release shortly thereafter. He hired an attorney who handled the case and made all court appearances, as Applicant did not appear in court. On or about August 12, 1994, the charges against him were *nolle prossed* (Exhibit 2), meaning the prosecution decided to relinquish the action against him.

6. On or about August 21, 1997, Applicant picked up a young woman he knew was a prostitute with the intent of engaging her services. The police approached the vehicle while it was parked. After pulling Applicant from the car, the prostitute exited the car too. Police searched the car and found drug contraband. Applicant was arrested for the following offenses: (1) lewd and lascivious behavior; (2) possession of marijuana; and (3) possession of drug paraphernalia (Exhibit 2). After his arrest he was taken to a local jail where he spent the night until released the next day. He hired an attorney who handled the case and made all court appearances, as Applicant did not appear in court. On or about September 8, 1997, the charges against him were disposed of as follows: (1) adjudication was withheld on count one, the prostitution-related offense, and he was ordered to pay \$100 court costs; and (2) the drug-related offenses, counts two and three, were *nolle prossed* (Exhibit B).

7. In December 2003, Applicant completed a security-clearance application (Exhibit 1). Questions 21-26 address an applicant's police record, and Question 24 asked if Applicant had ever been charged with or convicted of any drug- or alcohol-related offenses. (2) He answered the question in the negative. He did not disclose the 1994 and 1997 incidents in response to any other questions on the application. In signing the application, he certified that his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith, and that he understood that a false statement could be punished by federal law under 18 U.S.C. § 1001.

8. Applicant was interviewed by a special investigator for the Office of Personnel Management in September 2004. Applicant provided a written statement as a result of the interview (Exhibit 3). The 1997 incident was discussed in the statement, but the 1994 incident was not. Likewise, the statement does not address the omission of these two incidents from Applicant's security-clearance application.

9. In his written response to the SOR, Applicant denied intentionally, knowingly, or willfully making false statements in his security-clearance application. He explained that when he completed the application, he inquired about the requirements for Questions 21-25 and was told that he need not report anything that was more than five years old. Also, he explained that had he fully understood what was being asked, he would have reported the 1994 and 1997 incidents.

10. On direct examination, Applicant explained the inaccuracies in his security-clearance application as follows:

I was embarrassed about the incidents that took place. I really didn't - - I had a lawyer handle the cases. I really was unsure about what the charges were and I wasn't convicted and served no time. I didn't really pay much attention to them when I filled out the application and I guess I should have paid more attention to that (R. 20).

Also, he indicated some confusion about the question in two respects: (1) the time frame; and (2) if only convictions need to be reported (R. 22-23).

11. On cross-examination, Applicant addressed his confusion and explained that he focused on the conviction aspect of the question not the charged aspect of the question (R. 35). He admitted that when he left the jail after his 1994 arrest, he had a general idea that the allegations against him involved prostitution and drugs (R. 29). Likewise, he admitted that when he left the jail after his 1997 arrest, he was aware that he was accused of offenses involving prostitution and drugs (R. 32).

12. On redirect examination, Applicant said when he completed the security-clearance application he was unaware of the charges based on the 1994 arrest (R. 41). Concerning the 1997 arrest, he said he was aware of the lewd and lascivious charge and that the police had found drug paraphernalia in his car (R. 41). And on further cross-examination, Applicant admitted he thought about the 1994 and 1997 incidents when he completed his security-clearance application (R. 43).

13. In response to questions from the bench, Applicant agreed that while he sought out general advice about completing the security-clearance application, he did not ask about how to answer Question 24 (R. 48). In that regard, he explained as follows: "I was just I have to say that I was embarrassed from the instances and thought they were in the past and I guess I wanted to cover them up" (R. 48).

14. Applicant presented a wealth of favorable character evidence (Exhibit A). The evidence includes letters of recommendation, certificates, and performance evaluations.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>(3)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

### **BURDEN OF PROOF**

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(4)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(5)</sup> The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(6)</sup> An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(7)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance.<sup>(9)</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

### **CONCLUSIONS**

Personal conduct under Guideline E<sup>(11)</sup> is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government

when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Here, the government established its case under Guideline E. Applicant now acknowledges that he was twice charged with drug-related offenses and failed to disclose, as he should have, either incident in response to Question 24 of the security-clearance application. The issue is whether his answer to Question 24 was deliberately false. Applicant denies any intention to provide a deliberately false answer, but I conclude otherwise.

In reaching this conclusion, I note that Applicant gave inconsistent explanations for his answer to Question 24. For example, in his reply to the SOR, he said he did not disclose the two incidents because he understood them to be beyond a five-year period. Another example is, on direct examination, he said he was embarrassed about the incidents, was unsure about precise nature of the charges, didn't pay enough attention to the question, and had some confusion about the question. And a third example is, on cross-examination, he said he focused on the conviction aspect of the question not the charged aspect of the question. His inconsistent explanations undermine and undercut his credibility.

Looking at the whole picture, I conclude Applicant did not make a good-faith effort to answer Question 24 truthfully, completely, and correctly. The record evidence supports the conclusion that he knowingly and willfully gave a false answer to Question 24, because he was embarrassed about the two incidents and did not want the incidents revealed. The record evidence does not support a conclusion that he inadvertently overlooked Question 24, misunderstood the question, or genuinely thought the information need not be reported. Given these facts and circumstances, DC 2 [\(12\)](#) applies against Applicant. To sum up, his false answer to Question 24 shows questionable judgment, lack of candor, unreliability, and untrustworthiness.

I reviewed the seven mitigating conditions (MC) under the guideline and conclude none apply. Making false statements during the security-clearance process is a serious matter, not easily explained away, extenuated, or mitigated, because it goes to the heart of the process--whether the government can rely on an applicant to do the right thing even when it might be against their own interests. The record evidence shows Applicant proved himself to be unreliable when he gave a deliberately false answer to Question 24, and his explanations do nothing to lessen the case against him. Accordingly, Guideline E is decided against Applicant.

Under 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. 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.

Here, the government established its case under Guideline J. In 1994 and 1997, Applicant was arrested and charged with misdemeanors, and his criminal conduct continued when he gave a false answer on his security-clearance application in violation of 18 U.S.C. § 1001 (making a false statement within the jurisdiction of a federal agency). Given these facts and circumstances, both DC 1 [\(13\)](#) and DC 2 [\(14\)](#) apply against Applicant. His involvement in criminal conduct, both charged and uncharged, creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the six MC under the guideline and conclude none apply. Applicant's involvement with the police ended some years ago. But his criminal conduct continued in 2003 when he made a false statement on his security-clearance application, which is too recent and serious to be mitigated by passage of time. Accordingly, Guideline J is decided against Applicant.

To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole--including

Applicant's exhibits and his many years of honorable military service--the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

## FORMAL FINDINGS

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

SOR Paragraph 1-Guideline E: Against Applicant

Subparagraph a: Against Applicant

SOR Paragraph 2-Guideline J: Against Applicant

Subparagraphs a-b: Against 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.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Question 24 asks, in relevant part, "Have you even been charged with or convicted of any offense(s) related to alcohol or drugs?"
3. Executive Order 10865, § 7.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
6. Directive, Enclosure 3, Item E3.1.14.
7. Directive, Enclosure 3, Item E3.1.15.
8. Directive, Enclosure 3, Item E3.1.15.
9. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).
10. 484 U.S. at 531.
11. Directive, Enclosure 2, Attachment 5.
12. Directive, Item 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.
13. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

14. Directive, Item E2.A10.1.2.2. A single serious crime or multiple lesser offenses.