

DATE: July 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-02833

**DECISION OF ADMINISTRATIVE JUDGE**

**NOREEN A. LYNCH**

**APPEARANCES**

**FOR GOVERNMENT**

John T. Hammer, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has been arrested for assault on several occasions, including a 2005-second degree assault on his wife. He has mitigated security concerns based on drug involvement (use and sale) of marijuana in 2000, but he has not mitigated the security concern based on criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

On January 29, 2004, Applicant submitted a security clearance application. On September 27, 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 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. Specifically, the SOR set forth security concerns arising under Guideline J (Criminal Conduct), and Guideline H (Drug Involvement) of the Directive. 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 statement, dated October 24, 2005, Applicant responded to the SOR allegations and requested a hearing.

This matter was assigned to another administrative judge on April 20, 2006, but reassigned to me on May 12, 2006 because of caseload considerations. A notice of hearing was issued on May 16, 2006, scheduling the hearing for May 30, 2006. The hearing was conducted as scheduled. The government submitted six exhibits that were marked as Government Exhibits (GE) 1-6. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, and submitted four exhibits that were marked as Applicant's Exhibits A through D. (2) The exhibits were admitted without objection. Applicant testified in his own behalf. DOHA received the hearing transcript (Tr.) on June 7, 2006.

**Ruling On Procedure**

At the hearing, Department Counsel moved to amend the SOR. More specifically, he sought to add the following allegation:

1.g: On or about July 2005, Applicant was arrested for and charged with second degree assault involving his wife. A trial date is set for July 6, 2006.

There being no objection to the motion by Applicant, the motion was granted and the SOR amended as stated.

### **FINDINGS OF FACT**

Applicant admitted the allegations in subparagraphs 1.b., 1.c., 1.e., and 1.f. under Guideline J of the SOR, but denied the allegations in subparagraphs 1.a., and 1.d. He also admitted the allegations in subparagraphs 2.a. and 2.b. under Guideline H. (3) Those admissions to the allegations in the SOR, are incorporated as findings of fact. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 50-year-old employee of a defense contractor who graduated from high school in 1975. He then attended a local community college and a technical school. (4) He received an A.A. degree and a certificate in electronics in 1980. (5) While working on his education, he enlisted in the U.S. Navy. He served in the Navy in 1976 until he received an honorable discharge in 1978. (6)

In June 1977, while in the Navy, he was a passenger in a rental car with two companions. The car was stopped for a random check at the gate to a base, and the officers found a bag of marijuana in the vehicle. Although he was not charged by the military or local law enforcement, and received no punishment, he was mentioned in the subsequent investigation. Until the SOR was issued, however, he did not realize this incident was part of his record.

In 1984, Applicant married his first wife. After nine months they separated. (7) However, Applicant tried many times to reconcile with her. He called her often to schedule meetings to discuss a possible reunion. (8) She would sometimes cancel or not show up for a scheduled meeting. On one of those occasions in 1986, Applicant had a physical altercation with her. She called the police, and Applicant was arrested and charged with battery. The case was entered Nolle Prosequi. (9)

A little over a year later, on April 7, 1987, the police arrested and charged Applicant with theft, battery, obscene telephone contact, and harassment. He does not recall the details of this incident, but admits they were also connected with his first wife. Then in July 1987, he was charged with unauthorized use of a motor vehicle, theft, and assault. In his response to the SOR, he did not recall that event either. However, at the hearing on May 30, 2006, Applicant admitted he used his first wife's vehicle without her permission one evening to move some things. His rationale for this unauthorized use was that according to the law the car was marital property in the state, and they were only separated, still married, and he had the keys to the car and returned it the next day. The charges were placed on a stet docket. (10)

Applicant moved to another state in 1988. In October of that year, he was drinking one night while out socializing. When he started to drive his vehicle home, another car hit him. He blamed the accident on the friend who was with him at the time, and testified that he did not intend to commit a crime. He was charged with driving under the influence. He failed a Breathalyzer test. The court found him guilty, but he was given a probation before judgment. He was on probation for one year and required to attend Alcoholics Anonymous (AA) meetings. He successfully completed his probation and community service within the year. (11)

He moved back to his home state in 1991. Although he and his first wife finally divorced in 1990, they still had contact. They now have an amicable relationship. Applicant stressed the altercations with his first wife were due to the pressures of the separation and divorce and could not occur again. (12)

From February 2000 until May 2000, Applicant used marijuana that was given to him by a friend in another band. Applicant smoked marijuana in his home approximately 25 times during that period. On one occasion, he was asked to

sell some marijuana. He sold a small amount of marijuana for \$20.00.<sup>(13)</sup> His buyer was wired, and as a result Applicant was arrested two years later. Shortly after the marijuana incident, Applicant remarried in 2000. At that time, in addition to his employment in the electronics field, he taught music and performed in a band

Since 2001, Applicant has been employed with his current employer. As part of a job requirement, he submitted to a pre-employment drug screening on August 28, 2001. The test was negative for any drugs.<sup>(14)</sup> As an ongoing job requirement, there is a policy of random drug testing. Applicant's last random screening in May 2006 was negative.<sup>(15)</sup> He started as an electronic assembler and has been promoted to a test technician. He does not need a security clearance for his job.

In 2002, Applicant was charged and arrested for possession and distribution of marijuana. The arrest stemmed from the incident in which he sold marijuana.<sup>(16)</sup> The court found him guilty, and Applicant received probation before judgment.<sup>(17)</sup> He successfully completed his probation in 2003. He and his wife do not smoke marijuana or use drugs, nor do any of his band members. He does not associate with anyone in the music business from his past. Applicant does not intend to use marijuana again.

In August 2005, Appellant's second or current wife was in attendance during one of his performances with the band. She became intoxicated and started confronting Applicant about personal issues. A physical altercation ensued. She punched Applicant in the nose. He admits to assaulting her, but not to hitting her.<sup>(18)</sup> The police were called. His current wife pressed charges against him. A trial is scheduled for July 2006. They are still married, and his wife may drop the charge.

### 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 G, pertaining to alcohol consumption, with its respective DC and MC, applies 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>(19)</sup> The government has the burden of proving controverted facts.<sup>(20)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(21)</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>(22)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(23)</sup>

No one has a right to a security clearance<sup>(24)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(25)</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>(26)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(27)</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 J - Criminal Conduct:** The security concern is a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

**Guideline H - Drug Involvement:** The security concern is 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

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

#### **Guideline J Criminal Conduct**

The government has established its case under Guideline J. Based on Applicant's admissions, his testimony, several arrests for assault and battery, and the DUI charge and guilty plea, Criminal Conduct Disqualifying Condition (CC DC) E.2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and CC DC E.2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) apply to this case.

With the government's case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Here, Applicant's most recent arrest was in 2005 for assaulting his current wife. Moreover, he was earlier arrested for battery in 1986 and 1987. Therefore, Criminal Conduct Mitigating Condition (CC MC) E.2.A10.1.3.1 (*the criminal behavior was not recent*) and CC MC E.2.A10.1.3.2 (*the crime was an isolated incident*) do not apply.

Applicant's numerous arrests and his last altercation with his current wife do not persuade me that he is not likely to be involved in future incidents. He has a pattern of conduct that has continued into his relationship with his current wife. He stressed that his wife may drop the charges, but that does not negate the fact that he admitted to assaulting his wife a little over a year ago. His poor judgment and lack of responsibility for his actions are not clear signs of rehabilitation. The record is devoid of evidence of any counseling or anger management classes. CC MC E.2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*) does not apply in this case. Accordingly, the security concerns under Guideline J are not mitigated, and I find against Applicant.

#### **Guideline H-Drug Involvement**

The government has established its case under Guideline H. Based on Applicant's admissions in his responses to the allegations, Drug Involvement Disqualifying Condition (DI DC) E.2.A8.1.2.2 (*any drug abuse*) and DI DC E.2.A8.1.2.2 (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*) apply to this case.

Applicant used marijuana for a period of time ending in 2000. He does not have any other drug arrests. Thus, Drug Involvement Mitigating Condition (DI MC) E.2.A8.1.3.1 (*the drug involvement was not recent*) applies.

Applicant's employment requires him to be drug free. He has produced a random drug test from 2006 to show that he is in compliance with that policy. He also had a pre-employment screening in 2001 that was negative for drugs. Applicant and his current wife do not use drugs, and he has clearly stated an intent not to use them in the future. Thus, DI MC E.2.A8.1.3.3 (*a demonstrated intent not to abuse any drugs in the future*) applies in this case.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are

not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's judgment and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. In my evaluation of the record, I have carefully considered each piece of evidence in the context of the evidence and under all of the Directive guidelines that were generally applicable or might be applicable to the facts of this case. Under the whole person concept, I conclude that Applicant has not sustained his burden of proof in demonstrating his eligibility to hold a security clearance.

### **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 J: AGAINST APPLICANT

Subparagraph 1.a: Against 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

#### Paragraph 2. Guideline H: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is Denied.

Noreen A. Lynch

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. Applicant Exhibit A is Discharge Form 214N, dated October 17, 1978. Applicant Exhibit B is a letter from a corporate medical review, dated September 24, 2001. Applicant Exhibit C is a drug result, dated May 22, 2006. Applicant Exhibit D is an employer policy letter, dated May 18, 2006.

3. Applicant's response to the SOR, dated October 24, 2005.

4. Tr. 30.

5. Tr. 32.
6. Applicant Exhibit 1 at 1.
7. Tr. 36.
8. Tr. 37.
9. Government Exhibit 6 (Maryland Judiciary Case Search Results) at 3.
10. Tr. 50.
11. Tr. 54.
12. Tr. 96.
13. The transcript reflects Applicant's description of "a small baggie".
14. Applicant Exhibit B (Health services verification for substance abuse, dated September 24, 2001).
15. Applicant Exhibit C (Drug test results, dated May 18, 2006).
16. Tr. 55.
17. Tr. 72.
18. Tr. 80.
19. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
20. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
21. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
22. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
23. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
24. *Egan*, 484 U.S. at 531.
25. *Id.*
26. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
27. Executive Order 10865 § 7.