

DATE: January 25, 2007

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-13515

**ECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's personal conduct, drug abuse and criminal conduct raised serious security concerns. While Applicant rebutted concerns over criminal conduct as a hacker and mitigated concerns over his dated drug abuse, security concerns remain over his personal conduct because of his decision to hack into two satellite television systems to gain free access for himself, his family and friends for an extended period in 2002 to 2003 and to download computer programs for his personal use without paying the required cost. Also, he willfully failed to reveal his prior drug abuse in his 2002 initial Security Clearance Application (SF 86). Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on March 29, 2006. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. <sup>(1)</sup> The SOR alleges security concerns over personal conduct (Guideline E), over drug abuse (Guideline H), over criminal conduct (Guideline J), and information technology concerns (Guideline M). Applicant responded to these SOR allegations in an Answer notarized on April 11, 2006, where he admitted in part and denied in part. Initially, he requested a decision be made on the record. Later, on June 26, 2006, he requested a hearing. The case was assigned to me on July 25, 2006. On July 27, 2006, Department Counsel advised Applicant of the proposed date for hearing. On August 1, 2006, the Notice of Hearing was issued for August 17, 2006, at a location near where Applicant works and lives. Applicant stated he had sufficient notice to prepare for the hearing. (TR 9-11)

**Procedural Issues**

At the hearing Department Counsel noted the Government had previously advised Applicant of a motion to amend the SOR by deleting or withdrawing the following allegations:

SOR 1.d. and the cross-reference to 1.d. under Guideline J; and

SOR 4, Guideline M, allegation 4.a.

Applicant did not object. (TR 10-12) The motion to delete these allegations was granted. (TR 12)

At the hearing the Government offered three exhibits which were admitted into evidence. (Exhibits 1-3; TR 17-19) The request that I take administrative notice of two state criminal<sup>(2)</sup> statutes was also granted. (Exhibits I and II) Applicant testified, called two witnesses, and submitted Exhibits A through F, which were admitted into evidence. After one of Applicant's witnesses testified, he acted as Applicant's personal representative. (TR 37) The Government called one rebuttal witness. The transcript (TR) was received on August 29, 2006.

### **FINDINGS OF FACT**

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

#### **Personal Conduct, Drug Abuse and Criminal Conduct**

Applicant, 26 years old, has worked full-time with Defense Contractor #1 in State #1 since June 2003. Initially, he completed a Security Clearance Application (SF 86) in April 2002 when he was in college and was to work as a summer intern. While he certified that his statements on the form were "true, complete, and correct to the best" of his knowledge and belief, he knew his answer to Question 27 was incorrect: he willfully failed to reveal his past use of drugs in response to question 27 on the SF 86 form. (Answer; Exhibit 1; TR 69, 71-73) He subsequently was granted a Defense Department Secret clearance in June 2002 and again in June 2003. He currently has an interim Top Secret and has been granted access to several special access programs. Applicant received a B.S. degree from a state university<sup>(3)</sup> and graduated in May 2003 in computer engineering. He later completed another SF 86 in October 2004. Applicant was married in January 2004. (Answer; Exhibit 2; TR 68-69; 98)

Later Applicant subsequently decided to take corrective action and to reveal his marijuana use from 1995 to August 2001 on a Supplemental Questionnaire he submitted in May 2003 for access to a special access program where he revealed he had used marijuana three times from 1995 to August 2001. He later also disclosed his past use of drugs in response to question 27 on the October 2004 SF 86 form and divulged his marijuana use once in 1997 and once again in August 2001. (Answer; Exhibit 2; Exhibits D, E; TR 74-77)

Later Applicant was questioned about his drug use when interviewed by the Office of Personnel Management Federal Investigative Services (OPM) in June 2005 and again provided information in an Affidavit signed in February 2006. Applicant stated he experimented with marijuana in 1995 to 1996 when he was 15 to 16 years old. He used again in 1997 in high school; and his last use was in 2001 in college. He has only used marijuana and never sold or distributed drugs. He used marijuana three times in total. In February 2006<sup>(4)</sup> Applicant stated he would not use marijuana again while working at a defense contractor or holding a security clearance. He admitted he deliberately and willfully falsified his 2002 security form due to embarrassment and concerns that the clearance would be denied. He has not used any drugs since 2001 and stated in April 2006 and testified again in August 2006 that he will never use drugs in the future. He will not associate with people who use drugs in his presence. (Answer; Exhibit 3; TR 44-45; 55-56; 69-70) After disclosing his marijuana use from 1995 to August 2001 on a security form he submitted in May 2003, he was granted access to a special access program when his case was adjudicated favorably by the Air Force in September 2003. (TR 58-63; Exhibits D, E<sup>(5)</sup>) (SOR 1.g., 2.a., 3.a.)

#### **Computer Hacking in College**

The OPM agent testified that he recalled the interview<sup>(6)</sup> as it is rare for someone to provide information on computer hacking,<sup>(7)</sup>

which is now a standard question asked in security interviews. In response to the agent's question Applicant

acknowledged details on his computer hacking in college to the OPM agent in June 2005. (TR 97-98, 116-118)

- Applicant admitted he "hacked" the Direct TV satellite system in 2002 to 2003 by altering the card that slides into the satellite receiver in order to allow access to premium programming and pay-per-view events including pornographic movies without ever paying any fees. He estimated the value of these services as \$1,200 to \$2,000, but admits the value might have been higher. He later revised that estimate to \$1,540. He stated he did not realize he was committing a crime in gaining this access as he learned how to do it from public web sites. He made his own decision to stop access and to cease obtaining free satellite TV in March or April 2003. He would not do repeat this conduct. (Answer; Exhibit 3; TR 47-48; 81-86) (SOR 1.a., 3.a.) estimated to be approximately \$12,000. He later revised that estimate to \$6,720. (Answer; Exhibit 3; TR 78-81, 83-85) (SOR 1.b., 3.a.) days. He did this hacking as a challenge. (Answer; Exhibit 3; TR 86-87) (SOR 1.c., 3.a.) estimated in February 2006 to be at least \$10,000. He thought it was all right to take these actions as it was part of college culture and common practice. In February 2006 he still had three computers with this software on them, but no longer used the computers or the programs. In April 2006 and in his testimony in August 2006 he revised the value of the programs downward to \$750 to \$1,500. He stated his last use of an illegal program was in April 2005. In April 2006 he removed all illegal programs from his home computers. (Answer; Exhibit 3; TR 49-54) (SOR 1.e. 1.f., 3.a.)

### **References and Evaluations**

Applicant's functional manager for software engineering who has worked at the company for 25 years testified on his behalf. He explained that Applicant had a reputation as "one of the high flyers, one of the high potential folks." He has been Applicant's supervisor since fall 2003; in the matrix organization he only sees him sporadically. He stated Applicant was in high demand for any program with staffing needs. He assessed Applicant as "stellar, forthright, extremely intelligent, very concerned with the implications of everything." Knowing of the concerns outlined in the SOR, this manager nevertheless recommended Applicant be allowed to retain his security clearance. (Exhibit C; TR 25- 29; 29-34; 35-36)

A manager involved in hiring Applicant who supervised him from 2003 to 2005 testified on his behalf. Applicant disclosed to him in May 2003 his past drug use and his intention to document it in his next SF 86 which was required for his full-time employment; Applicant handed him the form in a sealed envelope to give to the security office. Applicant's special access clearance was subsequently granted in September 2003, and Applicant came to work on this manager's project. Applicant performed very well and did a very good job. He was able to amass a lot of knowledge on the project and performed very well. His work was excellent. He would like to have Applicant back on his project. He reported that Applicant complied with all security guidelines in the program. He recommended that Applicant be allowed to retain his security clearance. The 2004 SF 86 was submitted to gain Top Secret access for the project where he was already working. This manager has seen no misuse of company computer equipment since he has come to work. He views Applicant as remorseful for his past mistakes. (Exhibits A, F; TR 99-105; 105-107, 107-111)

A civil engineer who has worked with Applicant for four years attested to his exceptional technical capabilities as an engineer. His work has been exemplary and his potential for future contributions on critical DoD programs is tremendous. She assessed him as a "mature, conscientious and extremely dependable and trustworthy" person. She recommended him for continued access to classified information. (Exhibit B)

Applicant's overall evaluations in 2004 and in 2005 were that he had exceeded expectations (Level 4 or a 5 point scale). (Exhibit F)

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set

forth below:

### **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.**

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

***The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

### **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.**

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. The Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## **CONCLUSIONS**

### **Personal Conduct**

The Government established security concerns over two personal conduct issues. First, Applicant had an opportunity to disclose his past drug use on his 2002 SF 86, but failed to do so in answer to question 27 on the 2002 security form; so this conduct falls within disqualifying condition 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. He admitted he deliberately and willfully falsified his 2002 security form due to embarrassment and concerns that the clearance would be denied. He benefitted from this willful falsification as his security clearance was granted in 2002 and again in 2003.

Second, Applicant revealed extensive computer hacking while he was in college which reflects a pattern of dishonesty and rules violation under disqualifying condition 5. Applicant in 2002 to 2003 hacked the Direct TV satellite system by altering the card that slides into the satellite receiver in order to allow access to all premium programming and pay-per-view events including pornographic movies without ever paying any fees. He estimated the value of these services \$1,540. Applicant in 2002 to 2003 also enabled his father and other family members and four friends to access this satellite programming without paying required fees to Direct TV satellite system; he estimated the value as approximately \$6,720. Also, Applicant downloaded software from a website to alter an access card to obtain services from Dishnet Satellite Services without paying any fees for two to three days in the 2002 to 2003 period as a hacking challenge. Applicant between 1999 to 2003 downloaded more than 200 computer programs for personal use without paying the required cost; the estimated value of this computer software he estimated in February 2006 to be at least \$10,000. He believed it was all right to take these actions as hacking was part of college culture and common practice. Applicant's behavior <sup>(8)</sup> reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information.

Applicant failed to mitigate<sup>(9)</sup> security concerns over this personal conduct as he did not provide sufficient evidence to establish conditions to mitigate (MC) security concerns. For example under C 1, the information on his past drug use was substantiated and pertinent to a determination of judgment, trustworthiness, or reliability. While Applicant provided evidence under MC 2, that his 2002 SF 86 falsification was an isolated incident, was not recent, and that he subsequently provided correct information voluntarily, he did not take this corrective action until 2003 in a SF-86 and other forms submitted to a special access program. It was not until 2004 that he provided information on his past drug use in a SF 86 Form that went to DISCO.

While no mitigating conditions directly address the issues raised by his computer hacking in college, I have considered Applicant's conduct under the "whole person"<sup>(10)</sup> guidelines: first, I consider the nature, extent, and seriousness of the conduct. While hacking may have been part of the college culture, receiving such services without proper payment is equivalent to stealing under the state statute. While he was not prosecuted and there is no specific statute for the theft of satellite services as there is for theft of cable services, unquestionably, this misconduct was serious and extended for several months. He expanded his hacking so as not only for to benefit himself, but also to benefit his family and friends. He hacked not simply one satellite TV provider, but with two.

Second, the circumstances surrounding the conduct, to include knowledgeable participation weigh against Applicant. He knew such activities were wrong and that knowledge led to his ultimate decision to stop using these "free" services; however, he continued to benefit from the software he downloaded for a longer period of time until 2005 and maintained it on his computers until 2006. Third, the frequency and recency of the conduct is a mixed factor; he engaged in hacking frequently, but stopped doing so in 2003 and has been responsible in handling his security obligations for the company since he was granted access to classified information. One of his managers testified he saw no misuse of company computer equipment since Applicant has come to work.

Fourth, considering his age and maturity at the time of the conduct, I note he did this when he was in college; however, he was seen as a very bright college student which raises the expectations that his conduct would have been similarly elevated. Fifth, the voluntariness of the participation weighs against him as he engaged in hacking of his own free will and showed poor judgment in the extent of his hacking. Sixth, the presence or absence of rehabilitation and other pertinent behavioral changes does weigh in his favor because of his favorable references. He is proficient at work and highly regarded by his supervisors who commended his character and competence. However, he was slow to understand and correct his error in maintaining software programs and games that he had improperly download. Seventh, his motivation for the conduct is a mixed factor as he did it part as a technological challenge but also to benefit himself, his family and friends economically from free access. He admits substantial lost income to the satellite companies from his actions. Eighth, there seems little potential for future pressure, coercion, exploitation, or duress as he disclosed this conduct. Ninth, he insists that there is no likelihood of continuation or recurrence. His supervisor attest to his subsequent good character and conduct. He is a person with great potential to contribute. With this mixed assessment, there is not sufficient basis to mitigate this serious misconduct that Applicant concedes was improper.

Thus, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., and 1.g. incorporated under SOR Paragraph 1.

### **Drug Use**

Drug abuse or dependence may impair social or occupational functioning and increase the risk of an unauthorized disclosure of classified information. While the Government established security concerns over his drug use in college, her last use of marijuana was in 2001, approximately five years ago. His actions fall within conditions that could raise a security concern and may be disqualifying including under DC.1, any drug abuse.

Applicant mitigated<sup>(11)</sup> security concerns over his dated use of marijuana as there is no evidence that he ever returned to use drugs subsequently. Thus, MC 1, the drug involvement was not recent, applies to mitigate these

concerns. In addition, he has matured and now understands that he should not associate with others who use drugs. He clearly stated his intent to avoid any illegal drug use in the future, so falls within MC 3, a demonstrated intent not to abuse any drugs in the future. Thus, I conclude that he has mitigated the factors leading to the earlier drug involvement as again he has matured and more clearly understands the security concerns over any drug use or attempted use. His supervisors recommended Applicant for a position of trust. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant under subparagraphs 2.a. incorporated under SOR Paragraph 2.

### **Criminal Conduct**

The Government alleged security concerns over Applicant's criminal conduct from 2002 to 2003 in his hacking satellite systems while in college as discussed in detail under personal conduct, above. Where a general state statute covers stealing, there is no specific state statute that provides a penalty for theft of satellite television, only a statute for theft of cable television. In the case of the cable television statute, the burden is on the company to bring an action to enjoin and restrain any violation. Consequently, I concluded that the government did not sufficiently satisfy its burden that Applicant's conduct was criminal.

Even if one were to conclude that his conduct were to fall within the general state statute for stealing, Applicant meets mitigating [\(12\)](#) condition (MC) (1) as the behavior was not recent with respect to his dated criminal conduct in 2002 and 2003 and (6) there is clear evidence of rehabilitation as attested to by his managers and by his own assurances that he has changed his beliefs on the efficacy of computer hacking and assures he will not repeat this conduct.

Thus, he has established his case in mitigation. Hence, after considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 3.a. under SOR Paragraph 3.

### **FORMAL FINDINGS**

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Withdrawn

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Paragraph 2. Guideline H: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph 3.a.: For Applicant

Paragraph 4. Guideline M: WITHDRAWN

## 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 the Applicant. Clearance is denied.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. There is no state statute on the criminal consequences of stealing satellite television signals. (TR 22-23)
3. His exemplary academic record at the university was one factor that led to his being hired. (Exhibit C)
4. Applicant was initially interviewed by OPM in June 2005, and provided the Affidavit (Exhibit 3) in February 2006 when the OPM agent read Applicant the information from his report of investigation (ROI). The OPM investigator testified that he writes an ROI based on his notes and memory. Applicant provided the Affidavit in his handwriting and signed it. Applicant testified he was reluctant to change any of the cost figures he had given in the earlier interview for fear that action would be construed as his lying. (TR 77, 88-96; 97-98; Exhibit 3; TR 112-122) The agent testified that he allowed Applicant to make changes and that Applicant, in fact, lowered one figure from \$20,000 as reflected in the ROI to \$10,000 as reflected in the Statement. (Exhibit 3; TR 125)
5. Applicant offered an electronic copy of Exhibit E which he submitted at the same time as Exhibit D in May 2003 as the paper copy no longer exists, Exhibit E reflects the date it was re-printed, not the date it was originally submitted. (TR 59-62)
6. While OPM procedures no longer require a statement in the initial interview, later DOHA requested that OPM provide a statement signed by Applicant. The OPM agent testified that he believed Applicant was honest with him in the interview. (TR 116-117; 119-121; 122-123; 124-125)
7. In the networking sense, a *hacker* is one who specializes in work with the access control mechanisms for computer and network systems. This includes individuals who work toward maintaining and improving the integrity of such mechanisms. However, the most common usage of *hacker* in this respect refers to someone who exploits systems or gains unauthorized access by means of clever tactics and detailed knowledge, while taking advantage of any carelessness or ignorance on the part of system operators. This use of hacker as intruder (frequent in the media) generally has a strong negative connotation, and is disparaged and discouraged within the computer community, resulting in the modern Hacker definition controversy. <http://en.wikipedia.org/wiki/Hacker>
8. **Conditions that could raise a security concern and may be disqualifying also include:** 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; E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;
9. **Conditions that could mitigate security concerns include:** 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A

refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.

**10. E.2.2. Adjudication Process: In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:**

E.2.21.1. The nature, extent, and seriousness of the conduct;

E.2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation; E.2.2.1.3. The frequency and recency of the conduct;

E.2.2.1.4. The individual's age and maturity at the time of the conduct;

E.2.2.1.5. The voluntariness of the participation;

E.2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes; E.2.2.1.7. The motivation for the conduct;

E.2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and

E.2.2.1.9. The likelihood of continuation or recurrence.

**11. E2.A8.1.1.3. Conditions that could mitigate security concerns include:** E2.A8.1.1.3.1. The drug involvement was not recent; E2.A8.1.1.3.2. The drug involvement was an isolated or aberrational event; E2.A8.1.1.3.3. A demonstrated intent not to abuse any drugs in the future; E2.A8.1.1.3.4. Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable diagnosis by a credentialed medical professional.

**12. E2.A10.1.3. Conditions that could mitigate security concerns include:** E2.A10.1.3. 1. The criminal behavior was not recent; E2.A10.1.3. 2. The crime was an isolated incident; E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; E2.A10.1.3. 4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3. 5. Acquittal; E2.A10.1.3. 6. There is clear evidence of successful rehabilitation.