

DATE: January 29, 2007

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-16046

## **DECISION OF ADMINISTRATIVE JUDGE**

**THOMAS M. CREAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Daniel F. Crowley, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a 49-year-old engineer for a defense contractor. Four years ago, while working for a non-defense related company, he was arrested and convicted for an alcohol-related offense of open lewdness. He received counseling and treatment for this alcohol-related incident. As part of his employment in the defense industry, he completed a security clearance application but deliberately did not truthfully answer questions concerning the alcohol-related incident for fear truthful answers would affect his job. Under the "whole person" concept, Applicant has shown his false answers are not a security concern. Clearance is granted.

### **STATEMENT OF THE CASE**

On August 28, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). Applicant acknowledged receipt of the SOR on June 13, 2006. The SOR alleges security concerns under Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in writing on September 15, 2006. He requested a hearing before an administrative judge and the request was received by DOHA on September 18, 2006. Department Counsel was prepared to proceed with the case on October 31, 2006. The case was originally assigned to another administrative judge, and reassigned to me on November 2, 2006. A notice of hearing was issued on November 9, 2006, and the hearing convened on December 14, 2006. Three government exhibits, marked Government Exhibits 1-3, were admitted without objections. The testimony of the Applicant was received during the hearing. The transcript (Tr.) was received on December 29, 2006.

### **FINDINGS OF FACT**

Applicant admitted all of the allegations under Guideline E. After a thorough review of the pleadings, transcript, and

exhibits, I make the following essential findings of fact.

Applicant is 49 years old, and a mechanical engineer serving as a deputy project manager for a defense contractor. He has worked for his defense contractor employer for three years. Prior to starting work with the defense contractor, he worked as an engineer in the steel industry for over fifteen years. He is married with two children. He submitted a security clearance application as part of his employment with the defense contractor. He never held a security clearance or needed one prior to working for the defense contractor. <sup>(1)</sup>

Applicant drank heavily while on a business trip for a former employer in June 2002. His employer at the time was experiencing a business downturn and there was concern about future employment with the company. In fact shortly after this incident, the company declared bankruptcy. Applicant became intoxicated and left his hotel room in his underwear. He was arrested for, pled guilty to, and convicted of open lewdness. <sup>(2)</sup> Applicant acknowledged that his conviction was for an alcohol-related offense. <sup>(3)</sup> Applicant attended alcohol counseling and Alcoholic Anonymous after the

incident but prior to his conviction. <sup>(4)</sup> This is the only criminal or alcohol-related incident on Applicant's record. He is not normally a heavy drinker or abuser of alcohol. <sup>(5)</sup>

Applicant never completed a security clearance application until he completed one for the defense contractor in January 2005. In a moment of quick indecision and haste, he answered "NO" to question 24 asking if he had ever been charged with or convicted of an offense related to alcohol or drugs. <sup>(6)</sup> Applicant also answered "NO" to question 30 asking if in the last seven years the use of alcoholic beverages resulted in any alcohol-related treatment or counseling. <sup>(7)</sup> Applicant deliberately responded "NO" to both questions even though he knew he had been convicted of an alcohol-related offenses and received alcohol-related counseling or treatment. He was embarrassed by the incident and did not want his company to learn of it since it may affect his job. <sup>(8)</sup> His wife, son, and family physician know of the incident. He does not believe he can be blackmailed about the offense since his family, the people that mean the most to him, know of the incident. <sup>(9)</sup>

## POLICIES

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." <sup>(10)</sup> Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. <sup>(11)</sup> A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information.

The Directive sets forth adjudicative guidelines in Enclosure 2 for determining eligibility for access to classified information. It lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6. A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. <sup>(12)</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.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. <sup>(13)</sup> An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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 of recurrence. <sup>(14)</sup>

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information. <sup>(15)</sup> Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts. <sup>(16)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." <sup>(17)</sup> The government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating condition, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition. <sup>(18)</sup> "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability." <sup>(19)</sup> "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." <sup>(20)</sup>

Based upon a consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline E - Personal Conduct: A security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard 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 section below.

## CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Applicant's deliberate false answers to questions on his security clearance application brings the matter under Personal Conduct Disqualifying Condition (PC DC) 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 responsibility*). It is a security concern when an applicant does not include negative personal information on a security clearance application. The alcohol-related incident was considered by Applicant to be an embarrassment to him raising PC DC E2.A5.1.2.4 (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if know, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*).

I considered all of the Personal Conduct Mitigating Conditions and determine only one applies. Applicant did not deny the alcohol-related incident and admitted he deliberately did not list it on his security clearance application because he was embarrassed by the incident and thought it would affect his employment. Applicant knew and understood he was involved in an alcohol-related incident. He received counseling and treatment for this incident. He knew when he answered "NO" to questions 24 and 30, he was not truthful. Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.1 (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) does not apply. Applicant's admission to untruthful answers substantiates the information. Any untruthfulness has a direct relationship to an applicant's judgment, truthfulness, or reliability. His action in concealing the information was done less than two years ago, and was deliberate with an intent to deceive. Applicant did not admit to the alcohol-related incident or counseling until he received the SOR. Accordingly, PC MC E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), and PC MC E2.A5.1.3.3 (*the individual made a prompt, good-faith efforts to correct the falsification*

*before being confronted with the facts.*) do not apply. However, the people closest to Applicant, his wife and son, have full and complete knowledge of the incident and his counseling and treatment. This positive step established PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*).

While I cannot attached mitigating conditions to the Applicant's falsification of the incident on his security clearance application, I have considered Applicant's conduct under the "whole person" concept. I considered (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation, (3) the frequency and recency of the conduct, (4) the Applicant's age and maturity at the time of the conduct, (5) the voluntariness of participation, (6) the presence or absence of rehabilitation or 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. The incident caused by alcohol was not egregious or serious, but his failure to tell the truth was egregious and serious. Applicant is an engineer and a grown man who should understand the need for truthfulness. When Applicant completed the security clearance application, he was new to security requirements and procedures. He just came from an industry with different standards. He has learned the government requirements for security clearances, and the need for absolute truthfulness. He now realizes the ramifications of his untruthfulness. Applicant made false statements concerning one incident on one security clearance application. While he was a mature man with years of experience at the time of the incident, he has been rehabilitated, and has shown that his behavior concerning security matters has changed. His behavior was infrequent and happened under such unique circumstances that it is unlikely to recur. He acknowledged his behavior and has taken steps to alleviate the factors that caused untrustworthy, unreliable, or otherwise inappropriate behavior. Applicant has shown there is no likelihood of a recurrence. [\(21\)](#) Applicant has shown he would follow security procedures and properly safeguard classified information. Taking all of the factors into consideration, I conclude Applicant is eligible for access to classified information under the "Whole Person" concept.

## 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 E FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

## DECISION

In light of all of the circumstances in the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Thomas M. Crean

Administrative Judge

1. Tr. 13; Government Exhibit 1 (January 12, 2005).
2. Government Exhibit 2 (Federal Bureau of Investigation Criminal Justice Information report, dated April 29, 2005); Government Exhibit 3 (Pennsylvania Consolidated Statute, § 5901).
3. Tr. 21. While Applicant stated that he believed the offense was alcohol-related, the criminal statute lists the offense as a third degree misdemeanor but does not required it to be alcohol-related. The offense was caused by alcohol intoxication but is not an alcohol-related offense.

4. Tr. 16- 17, 22-23.

5. Tr. 15-16.

6. As noted in footnote 3, it is not clear that the offense was alcohol-related and should have been listed in response to question 24. However, if it should not have been listed in response to question 24, it should have been listed in response to question 26 asking if in the last seven years have you been arrested for, charged with, or convicted of any offense(s) not listed in response to other questions. There is a deliberate false answer on the security clearance application to either question 24 or 26.

7. Government Exhibit 1 (Security Clearance Application, dated January 12, 2005).

8. Tr. 13-14; 22-23.

9. Tr. 18-19.

10. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

11. Directive ¶ E2.2.1.

12. *See* Exec. Or. 10865 § 7.

13. *Id.*

14. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

15. Directive ¶ E3.1.14.

16. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

17. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

18. ISCR Case No. 99-0597 (App. Bd. Dec 13, 2000).

19. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

20. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

21. The adjudicative guidelines published in the Directive apply to this case since the SOR was issued on August 28, 2006. If the SOR was issued after September 1, 2006, the new adjudicative guidelines would be considered for this case. Under the new guidelines, such factors as the offense was minor, so much time had passed since the offense, the behavior is infrequent, the behavior happened under unique circumstances that are unlikely to recur, or the individual acknowledges the behavior and taken positive steps to alleviate the factors causing untrustworthy, unreliable, or inappropriate behavior, and the behavior is unlikely to recur would apply. *See*, § 17 (c) and (d), Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006.