

DATE: November 30, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 06-02163

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Emilio Jaksetic, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

The evidence is not sufficient to prove that Applicant made deliberately false statements when he completed his security-clearance application. His history of criminal conduct includes six arrests and five convictions, including two drunk driving convictions. His most recent conviction was in January 2005 for drunk driving. He was cited for an open-container offense in September 2006, disposition of which is pending. Applicant failed to present sufficient evidence to explain, extenuate, or mitigate the criminal conduct and alcohol consumption security concerns. Clearance is denied.

### **STATEMENT OF THE CASE**

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on arch 17, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR-- which is in essence the administrative complaint--alleges security concerns under Guideline J for criminal conduct, Guideline G for excessive alcohol consumption, and Guideline E for personal conduct (falsification). Applicant's reply to the SOR was received by DOHA on April 21, 2006, and he requested a decision without a hearing. On April 28, 2006, department counsel elected to request a hearing in this case. [\(2\)](#)

The case was assigned to me July 20, 2006. A notice of hearing was issued September 20, 2006, scheduling the hearing for October 17, 2006. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript November 13, 2006.

### **FINDINGS OF FACT**

In reply to the SOR, Applicant admitted the criminal conduct allegations under Guideline J and the two alcohol-related incidents alleged under Guideline G. He denied, with explanation, the three falsification allegations under Guideline E. His admissions are incorporated herein as findings of fact. In addition, after considering the record evidence as a whole,

I make the following findings of fact.

1. Applicant is a 28-year-old man who is employed as an apprentice shipfitter at a shipyard for a defense contractor. He has worked for his current employer since October 2002. He is seeking a secret level security clearance for his employment.
2. Applicant is a never-married man who has no children. He recently completed his third year of a four-year program at the shipyard's apprentice school. He plays second base on the school's baseball team and last year he was named an academic all-American. His grade-point average at the school is 3.6 on a 4.0 scale. In addition to apprentice school, Applicant is studying business administration with an on-line college.
3. As alleged in the SOR, Applicant has a history of criminal conduct, which he does not dispute. His several arrests and convictions are discussed below.
4. His criminal conduct started in 1997 when he was arrested and charged with breaking and entering and larceny, a felony. The charges stemmed from an incident where he and others entered a college-dorm room as a prank, but it went awry. He pleaded guilty to breaking and entering and was sentenced to 45 days of confinement, 18 months probation, and a fine and costs. The felony larceny charge was dismissed.
5. In 1998, he was arrested and charged with possession/manufacture/distribution of marijuana and obstruction of officers. The charges stemmed from an incident where Applicant was traveling in his car as a passenger and a buddy was driving. Applicant was sleeping when the police made the stop. Before the stop, the buddy attempted to throw some marijuana out the car window. Although this was not Applicant's marijuana, he knew his buddy had the marijuana. Some of the marijuana attached itself to Applicant's bare leg and was discovered by police when Applicant exited the car. On or about March 2, 1999, Applicant pleaded guilty to both charges. The state court sentenced him to 12-months probation and ordered him to pay a fine and various fees on the marijuana offense. He received a similar sentence for the other offense.
6. On or about March 30, 1999, Applicant was charged with second-degree forgery, a felony.  
  
The charge stemmed from an incident where Applicant was with the same buddy when the buddy planned to pass a forged check to a bank. Applicant drove his buddy to the bank knowing his buddy intended to pass the forged check. Otherwise, he had nothing to do with the forgery. Subsequently, the local district attorney dismissed the charge against Applicant.
7. Applicant was arrested again in November 2000, and he was charged with driving under the influence (DUI) and driving with a suspended or revoked license. The two offenses were disposed of in municipal court when he was convicted of both in January 2001. For the DUI offense, the court sentenced him to 1 day of confinement, 11 months and 29 days of probation, and ordered him to pay a \$750 fine. For the other offense, he was ordered to serve 12-months probation and pay a \$650 fine.
8. While still on probation, he was arrested in November 2001 and charged with driving with a suspended or revoked driver's license. In January 2002, the same municipal court convicted him as charged. The court sentenced him to serve 12-months probation, to pay a fine of \$1,250, and to perform community service.
9. Applicant was arrested for his second DUI offense in November 2004. He was convicted in state court in January 2005. The court sentenced him to serve 90 days in jail, but suspended 85 days.
10. More recently in September 2006, Applicant was stopped by police for speeding. During the stop, police discovered Applicant had an open container of alcohol in his vehicle and he was charged or cited accordingly. The charge stemmed from an incident where Applicant took the alcohol away from a person who was abusing it and then drove off. He had not drunk any alcohol before driving; indeed, he passed a field sobriety test. These matters were still pending disposition at the time of the hearing. In addition to this incident, Applicant does not have a current driver's license issued by his state of residence. His license was suspended due to a mixup resulting in his auto insurance lapsing.

11. To obtain a security clearance, Applicant completed a security-clearance application in July 2004. Applicant was given a worksheet or hard copy of the form and told to complete it in a couple of weeks or so. He procrastinated and then completed it in a rush when told he would be sent home from work if it was not completed. Thereafter, he reviewed the draft, provided some additional information in response to questions, and signed the finished product (Exhibit 1). In signing it, he certified that his statements were true, complete, and correct to the best of his knowledge and belief and made in good faith. Also, he certified that he understood that a knowing and willful false statement could be punished by a fine or imprisonment or both under federal law.

12. In completing the security-clearance application, he answered several questions about his police record. In response to Question 21<sup>(3)</sup> addressing felony charges or convictions, he disclosed being charged with second-degree forgery as discussed above. He did not disclose that he was charged with the felony offense of larceny as discussed above.

13. In response to Question 24<sup>(4)</sup> addressing charges or convictions for alcohol- or drug-related offenses, he disclosed his marijuana offense discussed above. He did not disclose the November 2000 DUI offense as discussed above. In addition to disclosing the marijuana offense, Applicant provided some explanatory remarks about the incident. He said that the marijuana found on his leg did not belong to him, but belonged to his buddy who was driving the vehicle.

14. In his reply to the SOR, Applicant denied intentionally or deliberately falsifying his responses to Questions 21 and 24. Concerning his remarks for Question 24, he explained that the marijuana was not his marijuana and that is why he said what he said. In his hearing testimony, Applicant, in essence, stood by his denials and his explanations.

15. In addition to his affirmative responses to Questions 21 and 24, Applicant disclosed other adverse information. He disclosed a driving with a suspended license offense in response to Question 26. Also, he disclosed a delinquent telephone account in response to Questions 38 and 39 addressing financial delinquencies.

## **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 upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.<sup>(5)</sup> 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>(6)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security 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>(7)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(8)</sup> The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(9)</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>(10)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(11)</sup>

No one has a right to a security clearance.<sup>(12)</sup> And 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>(13)</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**

## 1. The Criminal Conduct Security Concern

Under Guideline J, <sup>(14)</sup> criminal conduct is a 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 sensitive information.

Here, based on the record evidence as a whole, a security concern is raised under Guideline J. The record evidence shows Applicant has a history or pattern of criminal conduct based on his multiple arrests and convictions starting in 1997 through 2005. In short, he was convicted of breaking and entering in 1997, the marijuana offense in 1999, the first DUI offense in 2001, driving with a suspended or revoked license in 2002, and the second DUI offense in 2005. Although none of these convictions involved crimes of violence, personal injury, or loss or damage to property, his convictions reflect a pattern of questionable judgment. Given these facts and circumstances, both DC 1 <sup>(15)</sup> and DC 2 <sup>(16)</sup> apply against Applicant.

I reviewed the MCs under the guideline and conclude none apply. In particular, his second DUI offense in November 2004, adjudicated in January 2005, is too close in time for his criminal conduct to be considered not recent within the meaning of the guideline. <sup>(17)</sup> In addition, there is not clear evidence of successful rehabilitation. <sup>(18)</sup> Applicant has been arrested six times and convicted five times within the last ten years. His police record includes two alcohol-related offenses (the DUIs) and being at the wrong place or with the wrong people at the wrong time (the marijuana and forgery charges). Taken together, these matters constitute a pattern of criminal conduct and questionable judgment that appears to be ongoing as evidenced by the open-container offense in September 2006. At this point, it is too soon to tell if Applicant can establish a track record as a law-abiding citizen.

## 2. The Alcohol Consumption Security Concern

Under Guideline G, <sup>(19)</sup> a history of excessive alcohol consumption raises a security concern because of the potential for deliberate or inadvertent mishandling of classified information due to intoxication. The concern is that excessive consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Here, based on the record evidence as a whole, the government established its case under Guideline G. The record evidence shows Applicant has a history of excessive alcohol consumption as evidenced by his two DUI convictions. His DUI convictions are of special concern because his repetitive conduct indicates a tendency toward reckless behavior or an unwillingness to comply with the law. Given the facts here, DC 1 <sup>(20)</sup>--alcohol-related incidents away from work--applies against Applicant.

I reviewed the MCs under the guideline and conclude none apply. Applicant has not presented a persuasive case that his alcohol-related incidents are a thing of the past. Indeed, his second DUI offense took place in November 2004, which is relatively recent. At this point, it is too soon to tell if Applicant can establish a track record of responsible alcohol use with no further alcohol-related incidents.

## 3. The Personal Conduct Security Concern

Personal conduct under Guideline E <sup>(21)</sup> is always a security concern because it asks the central question: Does a person's past conduct justify 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.

To prove the falsification allegations, the government offered a single exhibit (the security-clearance application) and relied on its cross-examination of Applicant. Although substantial evidence is a low standard, the evidence here is skimpy and insufficient to prove that Applicant made deliberately false statements when completing his security-clearance application. First, I am not persuaded that Applicant gave deliberately false answers to Questions 21 and 24. His disclosures of adverse information in response to Questions 21, 24, 26, 38, and 39 undermines the government's case that Applicant was trying to deliberately omit, conceal, or falsify relevant and material facts on his security-clearance application. Second, although Applicant was certainly in constructive possession of marijuana when the police stopped the car, the unrebutted evidence is that the marijuana belonged to the driver, not Applicant. Given these facts, I am not persuaded that Applicant's explanatory remarks to Question 24 were deliberately false. Indeed, a reasonable person in the same or similar situation could honestly believe as Applicant did--that the marijuana was not his, at least as far as ownership was concerned.

#### **4. The Whole-Person Concept**

I have also considered the available information in light of the whole-person concept. Applicant is now a 28-year-old man and was an adult when his criminal activity took place.<sup>(22)</sup> His last conviction was his second DUI offense in January 2005, and his September 2006 open-container offense is pending. His history of criminal conduct and alcohol-related offenses appear to be a tendency to use questionable judgment that is likely to continue.<sup>(23)</sup> Also, he did not present a persuasive case that his criminal conduct and alcohol-related offenses are behind him and what steps he is taking to accomplish this.<sup>(24)</sup> His tendency to exercise questionable judgment is enough to have serious doubt about his suitability to handle and safeguard classified information. Although it appears he is doing well as an apprentice shipfitter attending apprentice school, those matters are not sufficient to mitigate the security concerns.

Considering the record evidence as a whole, I conclude Applicant failed to present sufficient evidence to explain, extenuate, or mitigate the criminal conduct and alcohol consumption security concerns. Therefore, Guidelines J and G are decided against Applicant. Based on lack of proof, the falsification allegations and Guideline E are decided for Applicant. To conclude, Applicant has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

### **FORMAL FINDINGS**

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

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a - f: Against Applicant

SOR ¶ 2-Guideline G: Against Applicant

Subparagraph a: Against Applicant

SOR ¶ 3-Guideline E: For Applicant

Subparagraphs a - c: For 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. Directive, Enclosure 3, Item E3.1.7 (authority for department counsel to request a hearing).

3. Question 21 asks, in relevant part, "Have you ever been charged with or convicted of any felony offense?"

4. Question 24 asks, in relevant part, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"

5. Directive, Item E2.2.1 (setting forth nine factors to consider under the whole-person concept).

6. Executive Order 10865, § 7.

7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

8. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

9. Directive, Enclosure 3, Item E3.1.14.

10. Directive, Enclosure 3, Item E3.1.15.

11. Directive, Enclosure 3, Item E3.1.15.

12. *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).

13. 484 U.S. at 531.

14. Directive, Enclosure 2, Attachment 10 (setting forth disqualifying and mitigating conditions).

15. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

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

17. Directive, Item E2.A10.1.3.1. The criminal behavior was not recent.

18. Directive, Item E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

19. Directive, Enclosure 2, Attachment 7 (setting forth disqualifying and mitigating conditions).

20. Item E2.A7.1.2.1.

21. Directive, Enclosure 2, Attachment 5 (setting forth disqualifying and mitigating conditions).

22. Directive, Item E2.2.1.4. The individual's age and maturity at the time of the conduct.

23. Directive, Item E2.2.1.9. The likelihood of continuation or recurrence.

24. Directive, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes.