

DATE: December 11, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 06-09564

## **DECISION OF ADMINISTRATIVE JUDGE**

**ARTHUR E. MARSHALL, JR.**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Candace L. Le'i, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro se*

### **SYNOPSIS**

Applicant is a 47-year-old custodian for a defense contractor. From November 1979 through August 2003, he was arrested over 20 times for a variety of crimes. He admitted the majority of arrests, but failed to submit any supporting documentation or narrative with regard to those he denied. Moreover, he failed to explain why only two of the criminal arrests were noted on his security clearance application. Applicant has failed to mitigate security concerns raised by his criminal conduct and personal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

On February 6, 2004, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). On June 13, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons, under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), 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, and recommended referral to an administrative judge to determine whether a clearance should be denied or revoked.

In a notarized letter, dated July 31, 2006, <sup>(1)</sup> Applicant responded to the SOR. He admitted all allegations under Guideline J, except those at subparagraphs 1.d, 1.h, 1.p, 1.s, 1.t, 1.v, and 1.w. He failed to admit or deny the allegation noted at subparagraph 1.aa. He admitted the allegation raised under Guideline E at subparagraph 1.d, but denied those in subparagraphs 1.a through 1.c. He also elected to have his case decided on the written record in lieu of a hearing. Department Counsel prepared the government's written case on September 28, 2006. A complete copy of the file of relevant material (FORM) <sup>(2)</sup> was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by November 17, 2006.

Applicant chose not to respond to the FORM. The case was assigned to me on November 29, 2006.

### FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. After a thorough and careful review of the evidence and exhibits, I make the following additional findings of fact:

Applicant is a 47-year-old custodian for a defense contractor and started his current period of employment in November 2003. His work background includes employment as a custodian and newspaper delivery person, as well as a decade of continuous employment in maintenance. He has received neither a post-secondary nor a vocational education. Married in 1995, he has three children, ranging in age from 10 to 15 years of age.

At some time in 2003, Applicant was terminated by his current employer. He was let go because, at the time, he was serving a jail sentence that precluded him from reporting to work. Through the efforts of his union, he was reinstated into his position later that year.

Subsequently, Applicant was asked to complete an SF-86, which he executed on February 6, 2004. In response to "**Question 21. Your Public Record - Felony Offenses** *Have you ever been charged with or convicted of any felony offenses? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607,*" Applicant noted an arrest for Petty Theft on March 1, 2001. (3) He answered "no" to "**Question 24. Your Police Record - Alcohol/Drug Offenses** *Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record . . .*" In response to "**Question 26. Your Public Record - Other Offenses** *In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related)?,*" Applicant noted one incident, a 2003 arrest for Corporal Injury to Spouse, cited in the SOR as allegation 1.z and discussed *infra*.

During the security clearance investigation, evidence that Applicant had been arrested approximately 26 times, for offenses including felonies and criminal conduct involving alcohol or drugs, was discovered. Consequently, the SOR of June 13, 2006, was issued. In addressing the SOR allegations, Applicant declined to offer any facts or arguments regarding his life, past or present, or concerning the criminal offenses alleged. With two exceptions, his commentary was limited to either stating "I admit" or "I deny" to the enumerated allegations. The exceptions are his admissions to SOR allegations 1.e (*December 21, 1982, arrest; charged with Robbery; found guilty and sentenced to nine months in jail, served six, and placed on three years probation*) and 1.f (*February 15, 1983, arrest; charged with Felony Robbery; found guilty and sentenced to nine months in jail, and three years probation*), to which he responded by stating "I admit but it was not me." No elaboration which might bring the government's evidence (4) into question or otherwise explain these admissions was offered.

Applicant admitted the SOR allegations raised in subparagraphs -

1.a (*November 10, 1979, arrest; charged with Felony Drunk Driving on Highway*),

1.b (*October 29, 1981, arrest; charged with Burglary and Conspiracy Burglary*),

1.c (*January 12, 1982, arrest; charged with Burglary*),

1.g (*April 24, 1985, arrest; charged with Assault With Dangerous Weapon/Person Without Firearm, Shoplifting, Obstructs/Resist Public Officer, Force Assault With Deadly Weapon No Firearm GBI Likely, and Theft; found guilty of Force Assault With A Deadly Weapon and Theft, sentenced to 15 days jail, and placed on two years probation*),

1.i (*March 22, 1987, arrest; charged with Petty Theft with Prior Jail Term/Burglary Robbery; found guilty and placed on 90 days probation*),

1.j (October 12, 1987, arrest; charged with Burglary; found guilty on an amended charge of Receiving, Etc., Known Stolen Property; sentenced to 30 days in jail and placed on two years probation),

1.k (April 10, 1988, arrest; charged with Petty Theft/Prior Jail Term for Theft: Special Offenses and Theft of Personal Property; found guilty of Petty Theft/Prior Jail Term, sentenced to 90 days in prison, and placed on three years probation),

1.l (August 13, 1989, arrest; charged with False Statement to Police; found guilty and sentenced to 120 days in jail, suspended, sentenced to serve nine days with credit for time served, placed on two years unsupervised probation and ordered not to operate a motor vehicle unless licensed/insured),

1.m (October 29, 1989, arrest; charged with Felony Burglary; found guilty of an amended charge of Burglary, Second Degree, sentenced to serve 16 months in jail, but served less than a year and paroled on or about August 10, 1990),

1.n (August 25, 1990, arrest; charged with Disorderly Conduct; pleaded guilty and sentenced to five days in prison with credit for three days served, ordered to pay a fine of \$141, and placed on 24 months unsupervised probation),

1.o (October 12, 1990, arrest; charged with Disorderly Conduct: Begging; after failing to appear five times, found guilty and sentenced to four days in jail with credit for four days served and placed on 12 months probation),

1.q (January 29, 1991, warrant arrest; charged with Disorderly Conduct: Begging), 1.r (March 4, 1991, arrest; charged with Disorderly Conduct: Begging; found guilty and sentenced to four days in jail and 12 months probation),

1.u (June 10, 1993, arrest; charged with Felony Burglary; found guilty of amended charge of Felony Petty Theft With Prior Jail Special Offenses, and served nine months of a 16 month sentence before being released on parole),

1.x (January 1, 1998, arrest; charged with Inflict Corporal Injury on Spouse/Co-habitant and Force/Assault With Deadly Weapon-Not Firearm; found guilty of Corporal Injury charge, sentenced to 30 days jail with credit for five days served, fined \$410, placed on three years of unsupervised probation, ordered to complete 10 days community service, and ordered to attend domestic violence counseling),

1.y (July 2, 1999, arrest; charged with Inflict Corporal Injury: Spouse/Co-habitant; found guilty on an amended charge of Battery, sentenced to two days in jail with credit for two days served, ordered to pay \$435 in fines, placed on three years probations, ordered to donate \$200 to the Battered Women's Shelter, ordered to complete 40 hours community service, and ordered to attend a domestic violence program and attend two Alcoholics Anonymous (AA) meetings per week for 26 weeks), and

1.z (August 26, 2003, arrest; charged with Inflict Corporal Injury on Spouse of Co-habitant, Threaten Crime With Intent to Terrorize, and Prevent/Dissuade Witness, Etc., Reporting; found guilty of Inflict Corporal Injury, sentenced to 25 days in jail with credit for 25 days served and eight days good time/work time, ordered to pay \$330 in fines, placed on probation for 48 months, ordered to enroll in a 12 month batterer counseling program, ordered to attend 52 AA/Narcotics Anonymous (NA) meeting, ordered not to own or use any dangerous or deadly weapon, and ordered to stay 100 yards away from any victim in the case).

In his response to the SOR, Applicant denied the allegations cited in SOR subparagraphs: 1.h (November 5, 1985, arrest; charged with Grand Theft Property), 1.p (November 30, 1990, arrest; charged with Grand Theft Vehicle, Vessels, Etc., and Take Vehicle Without Owner's Consent/Vehicle Theft), and 1.t (March 22, 1993, arrest; charged with Burglary). He offered no evidence to rebut the government's proffers, <sup>(5)</sup> or commentary regarding these allegations.

The government in its FORM conceded that it "does not have any documentary evidence pertaining to [the allegations set forth at 1.d, 1.v, 1.w, and 2.b], which Applicant denies in his Answer." <sup>(6)</sup> Those allegation are: 1.d (September 5, 1982, arrest; charged with Use/Under Influence Controlled Substance), 1.s (August 24, 1992, arrest and charge of Burglary), 1.v (August 29, 1993, arrest; charged with both Trespass; Injure Property and Burglary), 1.w (April 16, 1996, arrest; charged with Lewd and Lascivious Acts), and 2.b (Falsely answering "no" to "**Question 24. Your Police Record - Alcohol/Drug Offenses** For this item, report information regardless of whether the record in your case has

been 'sealed' or otherwise stricken from the court record . . .").

## 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. 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>(7)</sup> The government has the burden of proving controverted facts.<sup>(8)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(9)</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>(10)</sup> Additionally, 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 "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(13)</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>(14)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(15)</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 security 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 Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.<sup>(16)</sup>

**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.<sup>(17)</sup>

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has set forth allegations giving rise to security concerns under Guideline J and Guideline E. For clarity, I will discuss those two guidelines separately.

### ***Criminal Conduct***

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

the government has set forth allegations concerning 26 arrests occurring between November 1979 through August 2003 for offense ranging from petty to felony crimes. Applicant admits 19 of the allegations. Consequently, under Guideline J, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*[a]llegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2 (*[a] single serious crime or multiple lesser offenses*) apply.

With the government's case established, <sup>(18)</sup> the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Here, Applicant admits 19 of the allegations, including the most recent arrest in August 2003. Due to their numerosity and the recency of the last incident in Applicant's criminal chronology, neither CC MC E2.A10.1.3.1 (*[t]he criminal behavior was not recent*) nor FC MC E2.A6.1.3.2 (*[t]he crime was an isolated incident*) applies.

Applicant has not offered any explanation regarding any of the arrests and convictions alleged. At best, he has admitted to two of the arrests, while simultaneously stating that the person arrested was not him. By choosing to have this matter decided on the record, the meaning behind this incongruity cannot be clarified. Based on the scant record, there is no basis for application of either CC C E2.A10.1.3.3 (*[t]he person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) or CC MC E2.A10.1.3.4 (*[t]he person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*).

While it is notable that the vast majority of the criminal incidents cited are in the past, the 2003 incident is relatively recent and brings Applicant's history of criminal behavior into the present. It also bridges acts of domestic abuse occurring in 1998 and 1999 to 2003, despite two prior court orders to receive domestic violence counseling and an order to attend six months of AA meetings to help him comport his behavior. Although the more extensive requirements of the court in 2003 may have helped Applicant set a new course away from criminal activity and domestic abuse, he has failed to submit any evidence of additional counseling, letters of support or rehabilitation, or other proffer that he has reformed. Standing alone, this criminal history leaves grave doubts regarding his judgment and trustworthiness. Consequently, CC MC E2.A10.1.3.6 (*[t]here is clear evidence of successful rehabilitation*) does not apply, and Applicant has failed to mitigate the security concerns raised by his criminal conduct.

### ***Personal Conduct***

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. In this case, the government has shown that Applicant's answers to Question 21 and Question 26 of the SF-86 were less than forthcoming. <sup>(19)</sup> The government offers no direct evidence that Applicant intentionally provided false or misleading answers, or answers meant to actively conceal the truth; the Applicant, however, offers no explanation as to how he only provided information on two arrests on his SF-86.

At the very least, Applicant should have listed under Question 21 those felony arrests which he has admitted (1.a, 1.f, 1.m, and 1.u), just as he should have listed under Question 26 those other incidents which occurred in the seven years prior to the execution of his SF-86 (1.x and 1.y). The sheer numerousness of the incidents not reported suggest that Applicant actively concealed at least a part of his criminal history. His failure to disclose his past raises serious questions regarding his judgment, trustworthiness, and candor in a far more serious way than many of the more aged offense on his criminal record. Consequently, Personal Conduct Disqualifying Condition 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*) applies, and none of the available mitigating conditions apply. <sup>(20)</sup>

I have considered both the record evidence and Applicant in light of the "whole person" concept. He is a mature man with an extensive list of criminal infractions ranging from the petty to the felonious. Although the vast majority of his arrests and convictions occurred in the past, the pattern of domestic abuse which started in the late 1990s continued through 2003, despite counseling. He chose to rely solely on the record and, by choosing not to submit any information regarding his criminal past and his execution of the SF-86, he chose to preclude inquiry that might help mitigate security

concerns. In the absence of mitigating information or evidence of rehabilitation, he has failed to overcome the grave security concerns his criminal and personal conduct raise. Clearance is denied.

### **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 (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Subparagraph 1.n: Against Applicant

Subparagraph 1.o: Against Applicant

Subparagraph 1.p: Against Applicant

Subparagraph 1.q: Against Applicant

Subparagraph 1.r: Against Applicant

Subparagraph 1.s: Against Applicant

Subparagraph 1.t: Against Applicant

Subparagraph 1.u: Against Applicant

Subparagraph 1.v: For Applicant

Subparagraph 1.w: For Applicant

Subparagraph 1.x: Against Applicant

Subparagraph 1.y: Against Applicant

Subparagraph 1.z: Against Applicant

Subparagraph 1.aa: Against Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

### **DECISION**

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

Arthur E. Marshall, Jr.

Administrative Judge

1. A prior response was submitted by Applicant, dated June 26, 2006, but it was incomplete and returned for amendment and re-submission. The July 31, 2006, version is also incomplete, albeit to a lesser extent, inasmuch as Applicant failed to address the allegation found at subparagraph 1.aa.
2. The government submitted 15 items in support of its contentions.
3. This arrest is not one of the allegations at issue in the SOR.
4. Ex. 7 (Record, U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, dated October 9, 2003) at 1; *see also* FORM, generally.
5. *See, generally*, FORM.
6. FORM at 4.
7. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
8. ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
9. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
10. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
11. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
12. *Egan*, 484 U.S. 518, at 531.
13. *Id.*
14. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

15. Executive Order 10865 § 7.

16. Directive, Enclosure 2, ¶ E2.A10.1.1

17. Directive, Enclosure 2, ¶ E2.A5.1.1.

18. The government has failed, however, to carry its burden with regard to providing sufficient documentation to support the allegations set forth in the SOR at subparagraphs 1.d, 1.v, and 1.w.

19. The government concedes that it failed to provide evidence supporting an allegation that Applicant falsified his answer to Question 24. FORM at 4.

20. Again, although Applicant may have successfully rehabilitated himself, he has provided no evidence of such rehabilitation and, without such evidence, there is no basis to find that he has mitigated the security concerns raised.