



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 11-02635

**Appearances**

For Government: Melvin A. Howry, Department Counsel  
For Applicant: John Munoz Sr., Personal Representative

June 12, 2012

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on November 3, 2010. (Government Exhibit 1). On December 1, 2011, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant answered the SOR in writing on January 18, 2012, and requested a hearing before an Administrative Judge. The case was assigned to the undersigned Administrative Judge on February 27, 2012. A notice of hearing was issued on March 14, 2012, scheduling the hearing for April 18, 2012. The Government offered four exhibits, referred to as Government Exhibits 1 through 4, which were received without objection. The Applicant called one witness and presented two exhibits, referred to as

Applicant's Exhibits A and B, which were admitted into evidence without objection. He also testified on his own behalf. The Applicant submitted thirteen Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits 1 through 13. The transcript of the hearing (Tr.) was received on May 9, 2012. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## **FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, the testimony, and the exhibits. The Applicant is 27 years of age and unmarried. He is employed as an Armed Security Guard by a defense contractor and seeks to obtain a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Applicant denies the allegation set forth under this guideline. (See Applicant's Answer to SOR.) The Applicant began working for his current employer in November 2010. Prior to this investigation, he had never completed a security clearance application or held a security clearance before.

On November 3, 2010, the Applicant completed a security clearance application. (Government Exhibit 1.) Question 22, asked him about his police record. He failed to disclose that on May 2, 2010, he was arrested and charged with misdemeanor assault 3 for which he pled no contest and was placed on probation for one year. (Government Exhibit 1.) The Applicant explained that as a result of his deferred acceptance agreement with the court, he was told by the Judge that he did not have to disclose the arrest when he applied for a job, if he successfully completed the probationary period. At the time, the Applicant was specifically inquiring about a job he was applying for with the state police department. He was told by the Judge that he would not be charged or convicted of the assault 3 unless he violated probation. The Applicant completed his probation on July 6, 2011, and upon the completion of his probation, the case was dismissed. (Applicant's Exhibit B and Applicant's Post-Hearing Exhibit 1.) The Applicant states that he was not intentionally or deliberately intending to conceal anything from the Government, nor was he attempting to falsify his security clearance application. He did not realize the difference between the state job and the security clearance application. He now realizes that no matter what he is told, he is to be truthful at all times and reveal all of his background information to the Government.

The Applicant testified that when he was hired by his employer he was given a packet to fill out that included the security clearance application. He was given several

days to complete the packet. He stated that he went to the office secretary and asked her if he should reveal the arrest of May 2, 2010, on his application, when the Judge in the matter had told him that he did not have to. She initially told him that she could not give him any advice. She later said, well I guess you do not have to disclose it. (Tr. pp. 37- 38.)

On November 8, 2011, the Applicant enlisted in the United States Navy Reserves. At that point he had also discussed the issue with his uncle, who told him that he should reveal everything to the Government, no matter what. He disclosed the assault 3 incident to the Naval Recruiters and the Naval Commanding Officer of the unit. A waiver was granted by the Commanding Officer and the Applicant was allowed to enter the Naval Reserves. After completing boot camp it was determined that he had asthma and he was discharged for medical reasons.

The Applicant's uncle, who is a DoD Police Captain, testified that he has known the Applicant since birth and considers him responsible and trustworthy. (Tr. p. 25.) He also confirmed his discussions with the Applicant regarding the responsibilities involved with holding a security clearance, and the fact that he was misled by the Judge in this instance. (Tr. p. 32.) The Applicant is recommended for a security clearance.

A number of character references submitted on the Applicant's behalf that include his site manager, supervisor, father, mother, sister, uncle, friends and neighbors collectively indicate that the Applicant is respectful, courteous, helpful, motivated, ambitious, determined, focused and responsible in nature. His supervisor considers him to be one of his most dependable employees at the company who always has a positive attitude. He is never tardy and often volunteers to assist with working extra hours to help with scheduling relief. The Applicant is loved and admired by his family and friends, and is also a good musician. The Applicant is recommended for a security clearance. (Applicant's Post-Hearing Exhibits 1 through 13.)

The Applicant stated that he has been working hard to get in good physical shape. He spends a lot of his time at the gym working out with friends.

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern, which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every

case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline E (Personal Conduct)

15. *The Concern.* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Conditions that could raise a security concern:

16. (a) deliberate omission, concealment, or falsification of relevant 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.

Conditions that could mitigate security concerns:

17. (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;

- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct, which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is “clearly consistent with the national interest” to grant an Applicant’s request for access to classified information.

The DoD Directive states, “The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.”

The Government must make out a case under Guideline E (Personal Conduct) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

## **CONCLUSIONS**

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR.

In this case the Government has met its initial burden of proving that the Applicant falsified his security clearance application (Guideline E). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Based upon the evidence presented, the Applicant did not deliberately conceal his arrest from the Government on his security clearance application. He was clearly misguided by the court in this instance, and did not believe he had to. The Applicant is inexperienced and obviously did not realize that applying for a security clearance with the Federal Government is much different than applying for any other job. He now realizes that he is required to tell the truth at all times regardless of whether the offense was dismissed or expunged. In addition, it appears that he also received the wrong information from the company secretary, or was not given correct advice.

Under the particular facts of this case, his personal conduct is not considered a significant security risk, nor does it prohibit a favorable determination in this case. Under Guideline E, (Personal Conduct), Disqualifying Condition 16.(a) *deliberate omission, concealment, or falsification of relevant 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. Mitigating Condition 17.(b) *the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully* also applies. Consequently, I find for the Applicant under Guideline E (Personal Conduct.)

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, or other characteristics indicating that the person may properly safeguard classified information. I have also considered his favorable evidence, including the favorable witness testimony and numerous letters of recommendation.

Considering all the evidence, the Applicant has met the mitigating conditions of Guideline E of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guideline E.

## **FORMAL FINDINGS**

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant

## **DECISION**

In light of the circumstances presented by the record in this case, it is clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson  
Administrative Judge