

DATE: September 28, 2007

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In Re: )  
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 ----- ) ISCR Case No. 07-03289  
 SSN: ----- )  
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 Applicant for Security Clearance )  
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**DECISION OF ADMINISTRATIVE JUDGE  
MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Jr., Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's credibility is extremely suspect, as he has not been truthful or candid with information that he furnished to the United States Government in a Security Clearance Application (SCAs), regarding his past criminal conduct. Mitigation has not been shown. Clearance is denied.

**STATEMENT OF THE CASE**

On May 10, 2007, 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 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 Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be granted, denied or revoked.

In a signed and sworn statement, dated June 15, 2007, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing.

On July 10, 2007, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on August 17, 2007. Applicant did not submit any additional evidence. The case was assigned to this Administrative Judge on September 20, 2007.

In the FORM, Department Counsel offered five documentary exhibits (Items 1-5). No documents were offered by Applicant.

### **FINDINGS OF FACT**

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline E (Personal Conduct) of the Directive. The SOR contains two allegations, 1.a. and 1.b. under Guideline E. Applicant admitted SOR allegation 1.b., and he denied 1.a.. The admitted allegation is incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and FORM, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 33 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

#### **(Guideline E - Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government about criminal conduct that was committed by Applicant in 2006.

1.a. Applicant completed a signed, sworn Security Clearance Application (SCA) on June 23, 2006 (Item 1).

Question #23 of the SCA asks, In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above . . . For this item, report information regardless of whether the record in your case has been sealed or otherwise stricken from the record." Applicant answered "No." The Government has alleged that Applicant knowingly and

willfully failed to disclose that information that will be discussed under 1.b., below.

1.b. On Jan 3, 2006, Applicant was arrested and charged with Assault and Battery on a Family Member. Applicant pled Nolo Contendere, but he was found guilty. He was sentenced to two years probation. He was also ordered to pay a fine of \$400, and to enroll in and complete a Domestic Violence program.

Applicant avers that he has completed his probation under this conviction. Interrogatory responses, submitted and signed by Applicant on April 23, 2007, (Item 5) include a letter dated August 9, 2006, to the judge who presided over Applicant's case. The letter states that Applicant "has successfully completed probation."

By failing to list his 2006 arrest and conviction, Applicant clearly did not furnish complete and truthful information to the Government on the SCA that he completed on June 23, 2006. In his response to the SOR (Item 2), Applicant avers that he did not knowingly falsify a material fact on the SCA, but rather he states that it was a misunderstanding, because he believed that once he completed a domestic violence program the charges would be expunged.

I am not persuaded that Applicant's failure to list his criminal conduct on the SCA was an innocent misunderstanding for two reasons. First, Question #24 specifically asks him to list arrests, charges and convictions, even if the case had been sealed or otherwise stricken from the record. So the fact that Applicant believed the case had been expunged should not have prevented him from listing it on the SCA. Secondly, and even more significantly, in Item 5, response to question 2.a., Applicant admitted that he intentionally omitted listing the criminal offense" because I needed a job and I did felt (*sic*)embarrassed about it and did not want anyone to know because I was afraid I would not be granted a clearance."

### POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. 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.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [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 voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of drug usage, alcohol abuse and criminal conduct, and that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future."

The Administrative Judge can only draw those inferences or conclusions that have a 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."

## CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

### **(Guideline E -Personal Conduct)**

With respect to Guideline E, the evidence establishes that Applicant knowingly furnished to the Government untruthful, incomplete information, regarding his past criminal conduct, in a SCA, executed on June 23, 2006.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to the Government, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest information to the Government.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC 16, (a) applies because Applicant deliberately provided false and misleading information to the Government in a SCA. No Mitigating Condition applies under this Guideline. As a result of the misinformation that Applicant provided to the Government, his conduct exhibits questionable judgement, unreliability, and a lack of candor. I resolve Guideline E against Applicant.

### **FORMAL FINDINGS**

#### **Paragraph 1. Guideline E: AGAINST APPLICANT**

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against 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.

Martin H. Mogul  
Administrative Judge