

DATE: April 21, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-11833

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

James B Norman, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 32-year-old imagery analyst committed a series of seven criminal acts (both felony and misdemeanor) over a 15-year period from 1988 to March 2003. In addition, he falsified his 1999 security clearance application by omitting any mention of his two felony arrests and he lied to the arresting police officer in arch 2003 by reporting that his car, which he had crashed, had been stolen. His poor judgment and criminal conduct have continued until recently. itigation has not been established. Clearance is denied.

**STATEMENT OF THE CASE**

On September 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On September 12, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on January 27, 2004. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by March 17, 2004, and Applicant did submit a timely response to the FORM. The matter was assigned to me for resolution on March 2, 2004.

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## FINDINGS OF FACT

Applicant is a 32-year-old imagery analyst for a defense contractor. The SOR contains seven allegations (1.a. - 1.g.) under Guideline J (Criminal Conduct); and two allegations (2.a and 2.b.) under Guideline E (Personal Conduct). In his response to the SOR, Applicant admitted, with explanations, all of the SOR's allegations. These admissions are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including Applicant's responses to the SOR and the FORM, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

### Guideline J (Criminal Conduct)

Applicant was:

1.a. - arrested on October 10, 1988 and charged with Assault, 2nd degree, a felony. He pleaded guilty to Assault, third degree, a misdemeanor, and received one year probation;

1.b. - arrested on April 25, 1989 and charged with Disturbing the Peace;

1.c. - arrested on February 21, 1993, and charged with (1) Driving Under the Influence of Alcohol (DUI), (2) Speeding, (3) Reckless driving, (4) Violated Electric Signal, and (5) No State Driver's License. Bench Warrants for Speeding and No State Driver's License were outstanding at the time of his arrest. Applicant was fined, his driver's license was suspended, and he was ordered to attend alcohol classes.

1.d. - arrested on August 9, 1994 and charged with Burglary, a felony. The charge was reduced to Petit Theft, and he pleaded guilty. Adjudication was withheld, and he was fined \$240.00 which was satisfied by time served in jail.

1.e. - arrested in April 2000 and charged with (1) Trespassing, and (2) Prowling. Count (1) was dismissed and he fined \$250.00.

1.f. - charged on March 13, 2003 with (1) leaving the Scene of a Crash with Property Damage and (2) Careless Driving. He pleaded *nolo contendere* and was placed on six months supervised probation, ordered to pay restitution, and complete an Advanced Driver's Improvement School. Count (2) was dismissed.

1.g. - Applicant violated 10 U.S.C. 1001, based on the information in SOR 2.a., below.

### Guideline E (Personal Conduct)

2.a. - Applicant falsified material facts on his February 10, 1999 security clearance application (SF 86) when he responded to Question **21 - Your Police Record - Felony Offenses** by saying "No," when he knew he had been charged with at least two felony offenses, in as set forth in SOR 1.a and 1.d., above.

2.b. - Applicant lied about material facts during a March 18, 2003 interview with an agent of the Defense Security Service (DSS), when he deliberately failed to report he had been involved in an accident and had left the scene, as set forth in SOR 1.f., above.

## POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the

individual'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 or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct. Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make

critical judgments as to the credibility of witnesses, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers

who must be counted on to safeguard classified information and material twenty-four hours a day.

The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved

in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately

or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government

of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either

by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence

of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's

security."

## CONCLUSIONS

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file, the latest of which are Applicant's responses to the SOR and FORM. Applicant is a man of 32, born in September 1971. He has a history of criminal behavior varying from what might be described as relatively minor to very serious. That history began in 1989, when he was in high school, and has continued until recently, March 2003.

Applicant's explanations for the most part seem to attempt to minimize the seriousness of his conduct (Item 2). In any case, both individually and collectively, his explanations do not come anywhere near constituting valid excuses since they do not demonstrate good judgment, reliability, or trustworthiness.

In his most recent case, his explanation was "I lost control of my car and wrecked it into a neighborhood sign. Then I proceeded to walk home to my house (less than a mile instead of waiting for the police to arrive" (Item 2). In his sworn statement (Item 5), he states he hit a light pole and a sign after losing control of his car and that he walked the short distance home because he couldn't find his cell phone. The logical suggestion from this is that he intended from the beginning to call the police. He adds however that he didn't actually call the police until the next morning. No explanation is given for the delay, so it is not known from his statement is whether he just forgot, had fallen asleep, was under the influence of alcohol or something else, or some other reason. According to the police report (Item 9) the crash occurred at about 0126 hours on March 18, 2003; but the police did not speak to Applicant until 1130 hours, some 10 hours later. Applicant admitted he had been attending a St. Patrick's day celebration at a local bar. There is at least a suggestion from this that alcohol may have played a part in the crash. The police found Applicant's cell phone the car, which along with the license plate led to Applicant. There is no mention of the involvement of alcohol, but Applicant "was not able to provide a sensible explanation as to why he walked home"

In addition, the first thing mentioned in the police report is that Applicant wanted to report his car stolen and changed his mind only when the officer warned him about lying. From all of this evidence, it is indisputable that Applicant exercised extremely poor judgment from beginning to end. No evidence in mitigation is found in the record.

The March 2003 arrest and conviction by plea of *nolo contendere* occurred only about a year ago. This misconduct is both current and the culmination of a history and pattern of criminal conduct and the exercise of incredibly poor judgment that has continued since 1988. The use of alcohol has played a significant part in many of the seven incidents alleged in the SOR For example, the police report relating to his 1993 arrest (SOR 1.c.) (Item 6) cites the odor of alcoholic liquor and Applicant's failure to successfully complete a battery of tests designed to detect someone being under the influence of something.

### Guideline E (Personal Conduct)

2.a. - I have carefully considered Applicant's explanations for the alleged falsifications. As to the allegations in SOR 1.a. and 1.d., he clearly was arrested and charged with a felony in each case. His explanation for both misstatements is that he answered "no" without fully comprehending the question; i.e., that he thought it was for a felony in which he had been convicted (Response to FORM). His explanation is one that is easy to make but difficult to objectively prove or disprove.

Considered in the context of all of the record evidence, the overwhelming majority of which is negative as Applicant's security clearance eligibility, and the fact that the question clearly asks, "Have you ever been *arrested*," his explanation is simply not persuasive or credible

2.b. - His lying to the police in 2003 about his car being stolen is both admitted by him and established by the police report. His excuse that he then realized the error of his way and admitted the truth to the police does not excuse the original falsification and his explanation is refuted by the police report, which shows that he recanted only after being confronted by the police.

Considering the totality of the evidence, I am compelled to conclude that at every instance alleged in the SOR, when he had a choice as to what he would do and/or what he would say, he chose the wrong path, leading him into a situation where his character, as far as his eligibility for access to the nation's secrets is concerned, is defined by continuing, and increasingly serious examples of word and deeds showing poor judgment, unreliability, and untrustworthiness. I have carefully considered Applicant's explanations but he has done nothing to show sufficient maturity and rehabilitation. Completing the requirements imposed on him by legal proceedings is a sign of self interest rather than an indication of rehabilitation.

In fact, nothing Applicant has recently done or said anything that shows any real comprehension of the Government's concerns or what he needs to do to make himself eligible. Rather, he continues to seek to explain away and minimize the significance of each act of misconduct. He claims that he "take[s] the blame and responsibility for [his] actions and have done whatever was asked of me to right them by law" (Response to FORM at page 1). Although he cites his completion of all the requirements to correct his actions, he does not explain why he has committed so much misconduct over so long a period, and that has continued until recently. In essence, he has not demonstrated rehabilitation or the likelihood that such misconduct is safely behind him. As in all security clearance adjudications, the ultimate burden is on the Applicant to prove he is eligible and not on the Government to prove he is not eligible. Applicant has simply not done so.

Applying the findings of fact to *Guideline J*, Disqualifying Conditions (DC) 1 (allegations or admissions of criminal conduct) and 2 (a single serious or multiple lesser offenses) are clearly applicable. At the same time none of the possible Mitigating Conditions (MC) are demonstrated by the facts, e.g., the behavior is still recent (MC 1) and is not an isolated incident (MC 2) and there is no clear evidence of successful rehabilitation (MC 5). Consequently, the stated concern that a history or pattern of criminal activity creates a doubt about Applicant's judgment, reliability, and trustworthiness remains compelling.

Likewise, as to *Guideline E*, Applicant's falsifications come within Disqualifying Condition 2 (on his SF 86), but probably not 3 (since the false statement to the police officer did not occur in the context of a personnel security or trustworthiness determination). Disqualifying Condition 1 does apply, to the degree that the police officer qualifies as an "acquaintance."

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the 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.

**BARRY M. SAX**

Administrative Judge