

DATE: December 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-14016

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

George L. Wittenburg, Esquire

**SYNOPSIS**

This 69 year old senior engineer has worked for the same defense contractor for 38 years. He has held a DoD security clearance for almost the entire period, with no apparent problems. In 1975 and 1983, he had drunk driving arrests. In his 2000 security clearance application (SCA), he answered "No" to a question asking about alcohol-related arrests. In his 2002 interview with the Defense Security Service (DSS), he at first denied any alcohol-related arrests, but after being asked again, remembered first one and then both incidents. He claims he had forgotten both arrests until his memory was prompted by the repeated questions. He had mentioned the 1973 arrest in a 1989 SCA. The record does not establish that the omissions were intentional. Clearance is granted.

**STATEMENT OF THE CASE**

On April 21, 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 May 22, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was originally assigned to another Administrative Judge, but was reassigned to me on June 26, 2003, because of region rotation. A Notice of Hearing was issued on August 5, 2003, setting the hearing for August 18, 2003. At the hearing, the Government called one witness and offered five exhibits, which were marked for identification and admitted as Government Exhibits (GX) 1-5. The Applicant testified and offered one exhibit, which was marked and admitted as Applicant's Exhibit (AX) A. The transcript (Tr) was received at DOHA on September 2, 2003.

## **FINDINGS OF FACT**

Applicant is a 69-year-old senior electrical engineer for a defense contractor and has been employed by this company for 38 years. The SOR contains two falsification-related allegations under Guideline E (Personal Conduct) Criminal Conduct). As I understand Applicant's response, he denies that he made the statement alleged in his October 4, 2000 Questionnaire for National Security Positions (SF 86) (SOR1.a.) and in his February 8, 2000 interview with a Defense Security Service (DSS) (SOR 1.b.).

After considering the totality of the evidence derived from the contents of the FORM, I make the following additional FINDINGS OF FACT as to each SOR allegation:

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

1.a. - Applicant omitted a material fact on his October 4, 2001 SF 86 when he answered "No" to Question 24 Your Police Record - Alcohol/Drug Offenses). Specifically, he omitted citing his alcohol-related 1975 arrest and conviction for Drunk Driving and his 1983 arrest for Driving While Intoxicated (DWI). In an earlier SF 86, completed on September 6, 1989, Applicant did report his 1975 drunk driving arrest, but not the one that occurred in 1985. I find that the omissions in the 2001 SF 86 were caused by a lapse of memory, rather than from an intent to deceive the government.

1.b. - During his February 8, 2002 interview with an agent of the Defense Security Service (DSS), Applicant initially omitted any mention of his alcohol-related 1975 arrest and conviction, and his 1983 arrest for DWI. Instead, he said "No" when asked if there was anything else he wished to report, and "Absolutely Not," when then asked if he had been involved in any alcohol-related offenses. When asked a third time, he mentioned an incident in the 1980s and, thereafter discussed both incidents. I find that the initial omissions/denials were the result of a lapse of memory, and not the result of an intent to deceive the government.

## **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.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

### **GUIDELINE E (Personal Conduct)**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.

Conditions that could raise security concerns and may be disqualifying include:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire. . . . However, I find the omission was not deliberate.

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination. However, I find that the false or misleading information was not deliberate.

Conditions that could mitigate security concerns include:

None that are established by the evidence of record.

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 Directive's "whole person" concept, I am 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.

If the Government meets its initial burden of proof and establishes 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

It is clear from the totality of the record that the omitted information cited in both allegations, all pertaining to Applicant's alcohol-related arrests and convictions, is relevant and material to a determination of Applicant's eligibility for access to the nation's secrets. Second only to direct violations of rules and regulation dealing with the protection of specific classified documents, lying on a SF 86 or to a DSS agent goes most directly to the heart of the security clearance adjudication process.

#### *SF 86 of October 4, 2000*

In his SF 86, Applicant answered "No" to Question 24, which asks "Have you ever been charged with or convicted of any offense that was alcohol or drug-related arrested." He had in fact suffered such charges and convictions, so his answer was false. His answer of: "Absolutely not" to a similar question asked by the DSS agent was also false. Such false answers to relevant and material questions have a nexus, or rational connection, to an applicant's eligibility to hold a security clearance.

The only real issue to be resolved is whether Applicant's explanations qualify as acceptable mitigation or extenuation. I have carefully considered the fact that Applicant did report the 1973 incident on his 1989 SF 86, and his explanations for the recent omissions.

#### *DSS Interview of February 8, 2002*

In this interview, Applicant's explanation was that he had forgotten the 1975 and 1983 arrests when first speaking to the DSS agent in February 2002, even when asked if he had left anything out of his statement. He stated that only when asked a followup question, whether he ever had any incidents involving alcohol, was his memory triggered and he remembered first one incident and then the other.

In his May 22, 2003 response to the SOR, Applicant stated: "The truth is that I just plain forgot about [the 1975 matter] because of the length of time that had elapsed since they occurred," and that "it was simply a lapse of memory because of the length of time from which it had occurred" that caused his failure to report the incidents on his SF 86. As to the 1983 arrest, Applicant noted that he completed the SF 86 in 2000, 17 years after the fact and that, "in hindsight, I should have taken more time with my answer to make sure nothing had been omitted, but the truth of the matter is that I just plain forgot about them."

On his February 8, 2002, Applicant spoke at length with the DSS agent. In the written statement that resulted, Applicant

discussed the two incidents in considerable detail, along with claims that he had not originally remembered the incidents until the DSS agent asked the specific alcohol-related question earlier the same day. (GX 3).

The Report of Investigation (ROI) prepared to document the conversation agrees with Applicant's claims, up to a point. As the ROI records it, once the agent asked the alcohol-related trigger question, Applicant responded with a "rambling story" about his having received several speeding tickets in the 1950s, before going into the service. (GX 2). The agent then asked if any of these incidents were alcohol related and Applicant stated "No." The agent then asked the question again, and this time, Applicant stated: "I think I do remember one incident in the 1980s," and provided some details. When asked by the agent if there were any other such incidents, Applicant again stated "No," but after being specifically asked about another incident in the 1970s, Applicant added some details. (GX 5).

At the hearing, when asked if he remembered the 1975 and 1983 incidents, Applicant replied, "I do now," and provided considerable detail. (Tr at 26-29). He explains his "No" answer to Question 24 on the SF 86 as resulting from his having answered many questions on the SF 86 that really didn't apply to him *and* having forgotten forgetting about the 1973 and 19985 arrests. The two arrests did have "an impact" on Applicant (Tr at 47). When asked if he had any health problems that affect his memory, he responded, "Age." (*Id.*). He does remember filling out the 1989 SF 86 (GX 4), in which he did report the 1973 incident, but doesn't know why he omitted mention of the 1985 incident. He is surprised that he did not remember and report the two incidents on his 2000 SF 86. (GX 1) (Tr at 48, 49). The DSS agent's testimony about the interviews questions and answers add more detail and perspective, but does not refute Applicant's explanations. (57-69).

The major issue to be resolved is whether Applicant intentionally omitted relevant and material information from his SF 86 and in his initial statements to DSS. Applicant's state of mind

on both occasions cannot be objectively determined, but must be discerned in the context of the overall record. Applicant was in his mid 60s at the times in question. He is now 69 and nearing retirement, but he is currently actively employed in a responsible position, and an excellent employee according to his supervisor. At the same time, at the hearing, he did show some indication of forgetfulness as to other times in the past, e.g., the mixup of his Army discharge date as 1967, when it was actually 1957. (Tr at 44).

I note his 38 years of service to this major defense contractor and the absence of any evidence of security-related problems or any other derogatory information. The Director of Applicant's DoD program, who has known him for 26 years, views Applicant to be a "valued and conscientious employee, with high regard for matters of security. On those programs where I have worked with [Applicant], he has always exhibited good judgment and a high degree of responsibility and professionalism." (AX A). This evidence is more directly probative as to how Applicant is likely to handle classified information than that presented by the government in support of the SOR.

Based on the totality of the record, I conclude that Applicant did forget the 1975 and 1983 incidents when completing his 2000 SF 86 and during the initial part of his 2002 interview with DSS, until his memory was sufficiently stimulated. The record does not support a conclusion that Applicant had any reason to lie or that he was lying about the 20 and 28-year-old arrests. Overall, I conclude that the omissions cited in SOR 1. and 1.b., were the result of forgetfulness and not of any intent to deceive the government.

#### Disqualifying and Mitigating Conditions

I conclude that neither Disqualifying Condition (DC) 2 (deliberate omission on SF 86) nor DC 3 (deliberate omission to DSS agent) is established by the record.

### **FORMAL FINDINGS**

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

Guideline E (Personal Conduct) For the Applicant

SOR 1.a. For the Applicant

SOR 1.b. For the Applicant

**DECISION**

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

**BARRY M. SAX**

Administrative Judge