

DATE: April 29, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-16647

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 51-year-old painter for a defense contractor answered "no" in his December 1998 security clearance application to Questions 21 (felony offenses) and 24 (alcohol-related offenses), when he should have answered "Yes," and reported three such offenses in 1969 and 1972 (twice).

Applicant's explanations were reasonable and consistent in indicating that while he was mistaken in how to answer the questions, he did not act with the intent to deceive. Strong support from others who have known him for many years shows him to have become a man of integrity. Mitigation has been established. Clearance is granted.

**STATEMENT OF THE CASE**

On October 16, 2002, 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 November 12, 2002, Applicant submitted a response 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 30, 2003. The FORM instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Applicant's response was due by March 2, 2003, but no response to the FORM was received. The matter was assigned to me for resolution on March 17, 2003.

## FINDINGS OF FACT

Applicant is a 51-year-old (born in January 1952) painter for a defense contractor. He has been employed for the last seven years by a contractor working for the Navy.

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

### Guideline E (Personal Conduct)

1.a. - Applicant falsified material facts on his security clearance application (SF 86), dated December 11, 1998, when he answered "no" to "Question 21. Have you ever been charged with or convicted of any felony offense?" Applicant failed to mention his being charged with Robbery on March 16, 1969 (age 17) and Possession of Marijuana for Sale on June 14, 1972 (age 20), in State A, both offenses being felonies under State A law, but he did not do so deliberately.

1.b. - Applicant falsified material facts on his security clearance application (SF 86), dated December 11, 1998, when he answered "no" to "Question 24. Have you ever been charged with or convicted of any offense(s) related to drugs or alcohol?" Applicant deliberately failed to mention that he had been arrested on drug-related charges, as cited below:

1.b.(1) - He was arrested in January 1972 (age 20) in State A, and charged with Possession of Marijuana, and Possession of Narcotics Paraphernalia (PNP). He subsequently pleaded guilty to PNP, was fined \$100.00, and was placed on probation for one year;

1.b.(2) - He was arrested in June 1972 (age 20) in State A, and charged with Possession of marijuana for Sale.

Applicant claims the false answers were due to "a misunderstanding of the questions and forgetfulness" (Response to SOR) (Government Exhibit (GX) 3).

As to the "1972 marijuana and [City B] incidents, [he] had totally forgotten them until the DSS agent mentioned them during an interview. He "truly did not remember the incidents because he was focusing on the last seven years due to [his] misunderstanding of the questions" (*Id.*). When questioned by DSS, he realized his error and told the DSS agent everything he remembered about the incidents.

Applicant was a minor at the time of the 1969 robbery conviction. His statements about the robbery he made at the time and recently are consistent in admitting that he was at the scene with friends, but claiming that he did not know they were going to commit a robbery. The trial court's acceptance of this claim is suggested by the fact that only a "delinquent petition" was filed. Applicant was placed on probation, which he successfully completed in 1970, "without any fines, penalties or restrictions" (GX 3, GX 6, and GX 7). He believed that when he "turned 18-years-old, the conviction would be expunged from his record" (*Id.*). He has not suppressed his memory of the conviction. In fact, he uses it as an object lesson for his five sons. He has been married to the same woman for 23 years (GX 3).

The judge who presided at one of Applicant's court proceedings became his father-in-law in 1979, when applicant married his daughter. In his October 28, 2002 letter, the judge indicates his knowledge of and pride in what Applicant has done with his life over the past two decades. He states of Applicant:

[Applicant] grew into a fine man, a good husband, a father of five fine boys, and a good provider for a large family. Most important to me is his dedication as a father. Always a friend to his boys and mindful of their needs. Upper most their father.

(GX 3, attachment 3)

Applicant's attachments to his Response to the SOR include two letters of support, from a coworker and his minister.

Applicant's company has a zero tolerance policy as to drugs. He has never had a problem. He is active in a drug awareness organization that teaches young teenagers about the dangers of using drugs. His "security clearance is an

integral part of [his] job and [he] understands that [his] security clearance is a privilege and a responsibility that [he] does not take lightly" (GX 3).

### 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 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.

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

#### GUIDELINE E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate a person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying:

None that are established by the totality of the evidence.

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. 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.

### CONCLUSIONS

The focus of this case is whether Applicant deliberately omitted, concealed, or falsified material information on his December 18, 1998 security clearance application (SF 86). The fact of the omission of any mention of the 1969 and 1972 court matters is clear and undisputed. The question of whether Applicant acted deliberately, with the intent to deceive, is the issue to be decided. A defense of forgetfulness is not uncommon in cases involving alleged falsifications

on SF 86s.

Likewise a defense of a misunderstanding of the specific question is not uncommon. These are defenses that are easy to make and difficult to objectively disprove, but they are not necessarily or automatically unacceptable on that basis. Rather, the explanation offered must be evaluated on the basis of totality of the evidence, as to reasonableness and credibility.

In the present case, the Applicant claims to have forgotten his *being charged* with robbery in 1969 (29 years earlier) and the two drug-related arrests and/or conviction in 1972 (26 years earlier), in part because he was mistakenly focusing on the seven years prior to his completion of the SF 86 in 1998 (GX 3). As to the 1972 drug-related *conviction*, he states that he believed his expunged conviction came within the exception language in question 21 pertaining to convictions expunged under the Federal Controlled Substances Act (*Id.*). After having considered all of the evidence, I find Applicant's explanations for his failure to mention the cited arrests to be both consistent and credible.

My conclusion is reinforced by three factors: (1) the arrests and convictions occurred almost three decades earlier; (2) his understanding, remembrance, and full disclosure when asked by the DSS agent in January 2000; (3) his discussing his 1972 conviction with his five young sons, as an object lesson of how not to live your life; and (4) evidence from his father-in-law, a retired Judge, who presided over one of Applicant's court matters, who has known him as a son-in-law for over 20 years, who believes him to be a man of integrity and dedication, and who believes that Applicant "can be recommended without reservation" (GX 3, at attachment 3).

Applicant is a high school graduate employed as a painter by a defense contractor. Based on the totality of the record, I conclude that it is more likely that he misunderstood the response required by Question 21 than that he acted with the intent to deceive.

In addition, assuming for the sake of argument that Applicant knew or should have known that the 1969 and 1972 arrests and conviction should have been cited in response to question 21, the incident was an isolated incident, is no longer recent, and Applicant provided complete disclosure once made aware of what the question required (Mitigating Condition 1). On balance, I conclude that Applicant was careless and mistaken in his understanding of the question, rather than deliberate, and that he currently possesses the good judgment, reliability, and trustworthiness required of someone seeking a security clearance.

### **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

Subparagraph 1.a.. For the Applicant

Subparagraph 1.b.(1) For the Applicant

Subparagraph 1.b.(2) 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**