

DATE: July 25, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

CR Case No. 02-21099

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 54-year-old employee of a defense contractor has a history of marijuana use beginning in the 1970s, recurring in 1998/1999, and again in May 2002, when she was arrested for Driving Under the Influence (DUI) and marijuana was found in her purse. In her October 1998 security clearance application, she was required to report any drug use within the previous seven years; i.e., after October 1991, but failed to mention her marijuana use from October 1991 to 1992. In her sworn statement of July 2003, she stated that her previous use of marijuana had occurred "more than seven years prior." Considering that the last use had occurred near the seven-year mark, the Government has not established that the omission was deliberate and with the intent to deceive. As to the marijuana use, however, mitigation has not been adequately established. Clearance is denied.

**STATEMENT OF THE CASE**

On August 4, 2004, 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 August 17, 2004, 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 March 23, 2005. 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 May 11, 2005, but no submission to

the FORM was received as of that date. The matter was assigned to me for resolution on May 18, 2005.

### FINDINGS OF FACT

Applicant is a 51-year-old employee of a defense contractor (Item 4). The September 25, 2003 SOR contains four allegations under Guideline H (Drugs) and one allegation under Guideline E (Personal Conduct). In her August 17, 2004 response to the SOR (Item 2), Applicant *admits* the factual basis of all four drug-related allegations, SOR 1.a. - 1.d., and the single falsification-related allegation, 2.a. Applicant adds explanations and arguments to his answers. The admitted allegations 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, I make the following additional Findings of Fact as to the status, past and present, of each SOR allegation:

#### Guideline H (Drugs) - Applicant:

1.a. - used marijuana, with varying frequency, in the 1970s, from at least 1988 or 1989 to at least 1992, and in February 2002.

1.b. - was arrested in March 2002 and charged with (1) Driving While Intoxicated (DUI) and (2) Possession of Marijuana. She had consumed alcohol prior to the arrest. She was found guilty of Reckless Driving under Count (1), and was sentenced to 30 days in jail, suspended. She was ordered to pay \$280.00 in fines and costs, her driver's license was suspended for six months, and she was ordered to attend an alcohol awareness program. Count (2) was dismissed.

1.c. - purchased marijuana.

1.d. - continued to use marijuana, as set forth in 1.a., above, after being granted a DoD Top Secret security clearance in July 2000.

#### Guideline E (Personal Conduct)

2.a. Applicant knowingly falsified material facts on her security clearance application (SF 96) of October 27, 1998, as to Question 24. **Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs** - since age 16 or in the last seven years, when she answered "No," and omitted any mention of her use of marijuana from at least October 1991 to 1992.

### 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 is Applicant's response to the SOR and the attachments thereto.

Applicant is 51 years old. She was determined to be eligible for a DoD Top Secret security clearance in July 2000 (Item 9). Two years later, in 2002, she was arrested for (1) Driving Under the Influence of Alcohol (DUI) and (2) Possession of Marijuana. Although she was allowed to plead guilty to Reckless Driving, under Count (1) and count (2) was dismissed, the record compels the conclusion that she had committed both violations. This criminal misconduct is of current interest and must be evaluated along with all related past misconduct as well.

The Government's concerns about Applicant fall into two areas: (1) drug abuse), and (2) personal misconduct, specifically falsifications on her SF 86 about the extent of her substance abuse.

I have carefully considered Applicant's submissions. She has an impressive family history and is clearly a person of considerable accomplishment in helping others in need. From my consideration of the entire record, I conclude that, but for the 2002 incident, it is unlikely she would be involved in this adjudication, because of the age of her earlier drug-related misconduct. However,

her 2002 misconduct required a reevaluation of her entire history of misconduct, under the Directive's "whole person" concept.

Applicant views the 2000 incident as "a complete lapse of moral judgment and not truly reflective of who I am and where I come from" (Attachment A to response to SOR and GX 5). In context, however, I find it difficult to accept that what happened in March 2002 was an aberration and not indicative of her character. Applicant explains that some hours before the arrest, she had consumed one beer with her son, and then *she and a friend shared a bottle of red wine* between 9:00 p.m. and 11:00 p.m., when she stopped drinking alcohol. Shortly after midnight, *she began driving home and was stopped for speeding*. The officer suspected she had been drinking and asked her to take a field sobriety test, which she failed. *She then refused to take a breath test*, at which time she was handcuffed and taken to jail. *There she did take a test, which registered .10 blood alcohol*. It is also troubling that she so casually began using marijuana again two years after receiving a Top Secret security clearance in 2000.

A search of her purse in March 2002 revealed some marijuana, which Applicant had used some time before at a birthday party with her sister, and had forgotten it was still in her purse. "We were children of the seventies and it had been part of our culture" (Attachment A). Applicant had paid a friend to obtain the marijuana, which was be used "as a surprise for [her] sister" (GX 5). As to her involvement with marijuana, her claim that she had last used marijuana in 1992 and then just happened to use it one more time a month or so before she was arrested for DUI in March 2002 is unsupported by any other evidence and is too much of a coincidence to be credible.

Under *Guideline H (Drugs)*, the Conditions that could raise a security concern and may be disqualifying include: 1. any drug abuse; and 2. illegal drug possession. At the same time, the record does not support the existence of any mitigating conditions, specifically, (1) the three decades of marijuana use (1970s to at least 2002) is deemed to be still recent, (2) the drug involvement was not an isolated or infrequent event; (3) there is no demonstrated intent not to abuse drugs in the future; and (4) there is no evidence of the satisfactory completion of a drug treatment program prescribed by a credentialed medical professional.

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

As discussed above under Findings of Fact, I conclude that Applicant did not deliberately omit mentioning her marijuana use in early 1992 when completing her 1998 security clearance application. No disqualifying conditions have been established by the Government's evidence and/or the entire record.

### **FORMAL FINDINGS**

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

Guideline H (Drugs) Against the Applicant

Subparagraph I.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Guideline E (Personal Conduct) For the Applicant

Subparagraph 2.a. For 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**