

DATE: February 19, 2004

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In Re:

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SSN:-----

Applicant for Security Clearance

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ISCR Case No. 03-01542

REMAND DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

**FOR GOVERNMENT**

Jennifer I. Campbell, 6yEsquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 41-year-old plant protection officer has had significant financial problems dating back to at least 1996, and which are not yet resolved. In both a security clearance application and in interviews with DSS, he failed to mention any of these financial problems, either of his alcohol-related arrests, and his leaving a prior position after he had been told he would otherwise be terminated. His falsifications are criminal violations of 18 U.S.C. 1001. His explanations do not constitute adequate mitigation. Clearance is denied.

**STATEMENT OF THE CASE**

On May 14, 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 hearing before a DOHA Administrative Judge. The case was assigned to me on August 6, 2003. A Notice of Hearing was issued on September 8, 2003, and the hearing was conducted on September 24, 2003. The Government did not call any witnesses but introduced 14 exhibits, which were marked as Government's Exhibits (GX) 1-14. Applicant testified on his own behalf and introduced three exhibits, which were marked as Applicant's Exhibits (AX) A-C. Applicant submitted, through department Counsel, a timely post hearing exhibit, dated September 9, 2003, which was marked as AX D. Additional documents were submitted by Applicant, but did not reach me until after I received the Appeal Board

Decision and Remand Order. These documents have been marked as AX E. All exhibits have been admitted without objection. The transcript was received at DOHA on October 6, 2003.

I issued a Decision on November 24, 2003, in which I found it was not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Applicant appealed the decision and, on January 30, 2004, the DOHA Appeal Board issued an Appeal Board Decision and Remand Order. On the same day, January 30, 2004, the case file was returned to me with directions to issue a new decision after correcting the error(s) identified in the Decision and Remand Order, consistent with my obligations under Directive, Additional Procedural Guidance, Items E3.1.35. and E3.1.25.

As I understand the Appeal Board Decision and Remand Order, I erred by failing to consider timely information that Applicant had submitted after the completion of the hearing. I had kept the record open for a short period to allow Applicant to obtain and submit additional relevant information and/or documents, but I did not receive Applicant's second submission. Pursuant to the Appeal Board's instructions, I have obtained a copy of the documents in question from Department Counsel. I have complied with the Appeal Board's instruction to reopen the record, and to consider the admissibility of such records. I have considered the newly received documents and find them to be admissible as evidence I can properly consider. Having done so, they have been added to case file as Applicant's Exhibit E. I have now evaluated the entire record, including a consideration of the new documents, as discussed below.

Pursuant to the Appeal Board's instructions, I have issued this new decision, based on the now complete record.

### **FINDINGS OF FACT**

Applicant is a 41-year-old plant protection officer. The SOR contains 14 allegations under Guideline F (Financial Considerations), eight allegations under Guideline E (Personal Conduct), and four allegations under Guideline J (Criminal Conduct). In his response, Applicant admits all 14 allegations under Guideline F; admits allegations 2.e., part of 2.f., and 2.g. and denies allegations 2.a., 2.b., 2.c., 2.d., and 2.h. under Guideline E; and admits allegations 3.b., and 3.d., but denies allegations 3.a. and 3.c. under Guideline J Applicant's factual admissions, as cited above, are adopted as Findings of Fact.

After considering the totality of the evidence derived from Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

#### Guideline F (Financial Considerations)

1.a. - Applicant petitioned for Chapter 13 bankruptcy in 1996. His petition was dismissed in February 1997, at his request;

1.b. - Applicant is indebted to State A for delinquent taxes in the amount of \$730.00;

1.c. - 1.n - Except for the debt alleged in 1.m., which is a repeat of the same debt alleged in SOR 1.i., Applicant is indebted to the creditors listed in all of the allegations, in the approximate amounts cited in the SOR. An applicant's timely post-hearing the exhibit (AX D) is a September 9, 2003-letter from the creditor cited in SOR 1.f. It shows an agreement by this creditor to accept \$333.76, payable in four monthly installments beginning on September 30, 2003, in settlement of the \$556.24 owed. This is a positive step as to the resolution of *this one debt*, but Applicant has not shown that any payments have as yet been made. He is continuing his efforts to contact the other creditors, but with no success so far. I am required to base my decision on evidence of demonstrated rehabilitation. In the present case, there is simply not enough such evidence to overcome the continuing negative impact of his overall financial problems.

As supported by the new evidence submitted in post-hearing exhibit AX E, Applicant has begun the process of preparing a petition to be filed seeking protection under Chapter 7 of the U.S. Bankruptcy Code. Page 3 of the exhibit shows that Applicant has paid a document service company

\$50 toward a total charge of \$200, in return for which the company will "type documents for [Applicant] for a chapter 7 bankruptcy." The document is dated December 3, 2003. This evidence indicates that Applicant is planning to file for

Chapter 7, but has not yet done so. It indicates Applicant's good intentions, but shows no actual change in Applicant's financial position. Considering the time that has elapsed without any actual movement toward a resolution of his delinquent debts, the evidence compels a finding against Applicant as to the Financial Considerations allegations in Paragraph 1.

#### Guideline E (Personal Conduct)

2.a. - 2.d. allege falsifications by Applicant in response to four separate questions on his September 1, 2000 security clearance application (SF 86). In response to:

2.a. Question **24. Your Police Record - Alcohol/Drug Offenses**, "Have you ever been charged . . .," Applicant deliberately and improperly answered "No," and omitted any mention of the July 27, 2000 arrest cited in SOR 3.h.;

2.b. Question **33. Your Financial Record - Bankruptcy**, "In the last seven years, have you filed . . .," Applicant deliberately and improperly answered "NO," and omitted any mention of the Chapter 13 Bankruptcy cited in SOR 1.a., above;

2.c. - Question **38. Your Financial Delinquencies- 180days**, "In the last seven years, have you been over days delinquent . . .," Applicant answered "Yes," cited two debts owed to the Creditor named in SOR 1.i. and 1.m., but he deliberately and improperly omitted any mention of the other 12 delinquent debts cited in SOR 1.a. - 1.h. 1.j. - 1.l, and 1.o.;

2.d. - Question **39. Your Financial Delinquencies - 90 days**, "Are you currently over 90 days delinquent on any debts," Applicant deliberately and improperly answered "No," and omitted any mention of the 14 delinquent debts cited in SOR 1.a. -1.o.;

2.e. - Applicant falsified material information in his security clearance interview with DSS on February 9, 2001, when he deliberately and improperly failed to mention the July 27, 2000 alcohol-related arrest cited in SOR 3.b., below;

2.f. - Applicant falsified his sworn statement to DSS of October 7, 2000, when he deliberately and improperly failed to mention he had submitted a letter of resignation to State A Corrections authorities after an investigation for misconduct involving prisoners. (GX 1, GX 9, GX 10, GX 11);

2.g. - Applicant falsified a second sworn statement provided to DSS on October 7, 2000, after being confronted with the letter cited in 2.f., above, by deliberately and improperly claiming he had not been advised he was being terminated and failing to disclose he had been asked to resign in lieu of being fired;

2.h. - Applicant did not falsify material information during his October 7, 2000 interview with DSS by deliberately and improperly failing to mention the alcohol-related arrest on February 21, 2001, as cited in SOR 3.c. This arrest was denied by Applicant and has not otherwise been proven by the Government.

Except for SOR 2.h., above, the new evidence, AX E, does nor relate to or have any effect on the adverse finding previously entered as to the other paragraph 2 allegation, 2.a- 2.g., which are again found against Applicant.

#### Guideline J (Criminal Conduct)

3.a. - Each act of falsification cited in paragraph 2, constitutes a violation of 18 U.S.C. 1001;

3.b. - Applicant was arrested on July 27, 2000 and charged with (1) Driving Under the Influence of Liquor, (2) Driving Under te Influence with a Blood Alcohol Content Exceeding .10%, and (3) Extreme Driving Under the Influence. He pleaded guilty and was sentenced to 20days in jail, with 19 days suspended, a fine, ordered to attend alcohol-related classes, and had his driver's license suspended.;

3.c. - Applicant was not arrested on February 21, 2001. The arrest allegation actually relates to the July 27, 2000 arrest, cited in SOR 3.b., above. (GX 4 and Tr at 41);

3.d. - Applicant was charged in September 2002 with (1) Open Alcohol Container and (2) No Proof of Insurance. He was ordered to appear in court on October 25, 2002, to answer these charges. He appeared, and paid a fine of \$140 on the Open Container charge. (Tr at 44).

Applicant received positive letters of support from several individuals who know him from work (AX A - AX C). They view Applicant as dedicated to his work and a man they respect. The letters do not contain any information suggesting that the writers were aware of the nature, variety, and seriousness of the allegations against Applicant.

### 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 judgment, irresponsibility, or emotionally unstable behavior.

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

#### GUIDELINE F (Financial Conduct)

*The Concern:* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

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

1. A history of not meeting financial obligations;
3. Inability or unwillingness to satisfy debts

Conditions that could mitigate security concerns:

None that are applicable under the facts of this case.

#### GUIDELINE E (Personal Conduct)

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information;

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

2. Deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar forms used to conduct investigations . . . ;
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator . . .

in connection with a personnel security or trustworthiness determination;

Conditions that could mitigate security concerns:

None that are established under the facts of this case.

#### GUIDELINE J (Criminal Conduct)

*The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

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

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

None that are established under the facts of this case.

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.

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 or work life, 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 an applicant's admissions or by other evidence) 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

I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record. I conclude that the totality of the evidence establishes a *prima facie* or initial case as to all SOR allegations, except for 2.h and 3.c., and the proven misconduct in turn establishes a nexus or connection with Applicant's security clearance eligibility. The issue remains however as to whether Applicant had established

mitigation of all or any of the allegations.

*Financial Problems* - SOR 1.a. - Applicant explained that he withdrew his 1996 Chapter 13 petition because he had thought about and decided he didn't want a bankruptcy to "show on [his] record." (Tr at 29). Instead, he decided to contact the creditors and ask about some sort of resolution. (Tr at 30).

SOR 1.b.-1.n. - As of 2003, however, Applicant had not progressed very far in addressing his overall financial problems and as of September 2003, he had just contacted one creditor and was still attempting to make contact with the others. (AX E). The most recent credit bureau reports, from August 2003, show that many of the delinquent debts are still outstanding, referred for collection, or written off. (GX 12, GX 13, and GX 14). I find for Applicant only as to SOR 1.m., which the evidence shows is actually a duplicate of the debt alleged in SOR 1.i. (Tr at 38 and GX 3, GX 12, GX 13, and GX 14).

At the hearing he testified that he "in the process right now of bankruptcy, so the only thing I have to do is go ahead and file it." (Tr at 32-34). After the September 24, 2003 hearing, he submitted additional documentation (AX E), but the new evidence does not add anything substantial to Applicant's hearing testimony. He has paid a partial fee to a firm which has agreed to prepare a Chapter 7 bankruptcy filing for him, but no filing has yet taken place. Consequently, the status of the majority of the delinquent debts has not changed.

Disqualifying Conditions 1 (history of not meeting financial obligations) and 3 (inability or unwillingness to satisfy debts) are clearly applicable but none of the possible mitigating conditions have been established by the record. All of these allegations are found against Applicant, except for 1.m., which Applicant has established is actually the same debt as that cited in SOR 1.i.

### *Personal Conduct*

SOR 2.a.-2.h. - I have considered Applicant's explanations for the series of incorrect answers he gave to Questions 24, 33, 38, and 39, on his security clearance application (SF 86) (GX 2, dated September 1, 2000) and in his sworn statements given to the Defense Security Service (GX 6, GX 8, GX 9, GX 10, and GX 11), as cited in the SOR, and supported by the government's exhibits. Applicant's explanations are sometimes conflicting, unclear, and confusing.

Applicant seemed to be suggesting that he had originally answered the arrest questions correctly, but that somehow, erroneous information had been transferred to the final version of the SF 86, which had been prepared by his employer, but which he had signed as correct before it was submitted. (Tr at 45-47). Applicant added that he did have the disk on which he had saved the initial SF 86. He has never submitted any such disk. In the recently obtained AX E, Applicant contends that "my arrest . . . was 7/2000 not 2/2001" and that he should be obtaining the correct information in about "7 to 10 days." (AX E at page 2).

The arrest alleged in SOR 3.c. is supported in the record only by GX 4, the FBI Criminal History Record. It shows "2001/02/21" as the date "arrested or received," so it is not absolute proof of an arrest on that date, since it just as well refer to the date of receipt of the record by the FBI. The same FBI record does not show the July 27, 2000 arrest, so it is probable we are dealing with only one arrest, the one on July 27, 2000. Since I find the Government has provided inadequate proof on the arrest, I find for Applicant as to the falsification allegation in SOR 2.h.

Applicant explanation for why he did not report the bankruptcy filing was that he thought "it was not going to be on the record anymore" and that because it had been dismissed, "it was like it never happened." (Tr at 48). These explanations, particularly when considered in the context of Applicant's other falsifications, lack substantial credibility or weight. Applicant was clearly aware of his 1996 bankruptcy *filing* and series of delinquent debts, and he knew and should have known that he was required to report them in his security clearance application and in his interviews with DSS. He is now planning a Chapter 13 bankruptcy filing.

Applicant's explanations for the falsifications in his written and oral statement to DSS are similar to those involving the security clearance application (Tr at 53, 54). Specifically, as to 2.f. and 2.g., I conclude that he knew and must have known that he left his position as a correction officer under precisely the circumstances required to be reported. Disqualifying Conditions 2 (falsification of security clearance applications) and 3 (false or misleading information given

to DSS) are clearly applicable, but none of the possible mitigating conditions have been established by the record. Consequently, I find these allegations against Applicant. Applicant's post hearing evidence does not change this conclusion.

*Criminal Conduct* - Nothing Applicant has said or done mitigates his pattern of recent acts of alcohol-related criminal conduct. In addition, each act of omission, concealment or falsification cited in SOR 2.a.- 2.d is a separate violation of 10 U.S.C. 1001, a felony. All three alcohol-related arrests occurred as alleged, regardless of questions about the actual date of one arrest, and they indicate that Applicant has both questionable judgment and a serious problem with alcohol. Disqualifying Conditions 1 (allegations or admissions of criminal conduct); and 2 (a single serious crime or multiple lesser offenses) are applicable, but none of the possible mitigating conditions are established by the record. Allegation 3.c. is found for Applicant, for the reasons cited in 2.h., above, but allegations 3.a., 3.b, and 3.d are found against Applicant.

Overall, I conclude that the newly considered evidence, AX E, has an effect on only two of the 24 allegations in the SOR. For the reasons stated above, the new information does not change the overall evaluation and determination. The only change compelled by the new information is that I conclude that the Government has not proven that Applicant was arrested on. Thus, SOR 2.h. and 3.c, both of which refer to the alleged arrest on February 21, 2001, are found for Applicant, but all other SOR allegations are found against Applicant.

Even considering the favorable comments provided by Applicant's colleagues, and the changes resulting from the new evidence, the overall conduct that resulted in 22 adverse findings under three separate guidelines contains too many recent examples of the exercise of poor judgment, unreliability, and untrustworthiness to permit a finding that he is currently eligible for access to the nation's secrets.

### **FORMAL FINDINGS**

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

Guideline F (Financial Considerations) Against the Applicant

Subparagraph 1.a - 1.l, and 1.n. Against the Applicant

Subparagraph 1.m. For the Applicant

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 2.a. - 2.g. Against the Applicant

Subparagraph 2.h. For the Applicant

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 3.a., 3.b., and 3.d. Against the Applicant

Subparagraph 3.c. 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**