

DATE: March 11, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-09936

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This 27-year-old Analyst deliberately omitted four separate pieces of covered information under Questions 24 and 27 in his 2002 security clearance application. No mitigation has been established. Clearance is denied.

**STATEMENT OF THE CASE**

On May 20, 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 an answer to the SOR, dated June 14, 2004, and a second undated document that was received by DoD on July 13, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge after a hearing. The matter was assigned to me for resolution on October 12, 2004. A Notice of Hearing was issued on December 6, 2004, setting the hearing for December 28, 2004. At the hearing, the Government introduced five exhibits (GX 1 - 5). Applicant testified, and introduced 4 exhibits (Applicant's Exhibits (AX) A - D). The transcript was received at DOHA on January 12, 2005.

**FINDINGS OF FACT**

Applicant is a 27-year-old Analyst for a defense contractor. The July 8, 2004 SOR contains four suballegations under Guideline E (Personal Conduct). In his August 6, 2004 Response to the SOR, Applicant specifically admits certain points and goes to add extensive explanations that are clearly not specific admissions of other matters. Only the matters that are explicitly admitted are accepted and deemed to be Findings of Fact.

After considering the totality of the evidence, I make the following additional Findings Of Fact as to the status, past and present, of each SOR allegation:

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

1.a. - You falsified material facts on a Security Clearance Application, SF 86, executed by you on May 30, 2002, in response to Question **"24. Your Police Record - Alcohol/Drug Offenses.** Have you ever been charged with or convicted of any offense related to alcohol or drugs?" You cited a Driving Under the Influence charged in July 1998, but you deliberately failed to fully disclose the following offenses:

(1) You were charged with (1) Driving Under the Influence (DUI)/Drugs and (2) Possession of Marijuana in about July 1998. You pleaded guilty to Count I and Count II was dismissed as part of a plea agreement. You were fined \$1,248.00, sentenced to two days in jail with credit for time served, placed on three years unsupervised probation, and ordered to enroll in a DUI school;

(2) You were arrested in about 1997 for being Under the Influence as a Minor. You were transported to a detoxification center and held for six hours before being released.

1.b. - You were arrested in 1997 and charged with Being Under the Influence as a Minor coincident to a police investigation involving a car in which you were a passenger. You removed marijuana from the car and hid it before the police arrived.

1.c. - You falsified material facts on a Security Clearance Application, SF 86, executed by you on May 30, 2002, in response to Question **"27 Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs."** You answered that you had used cocaine seven times between September 18, 1997 and July 12, 1998; whereas in truth you deliberately failed to list that you continued to use marijuana about twice a week from about July 1998 to at least June 18, 2001.

### **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.

The security of classified information is entrusted to individuals who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is appropriately concerned where information indicates that an applicant, 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

*Guideline E (Personal Conduct)* - All of the allegations involve Applicant's use of alcohol and/or drugs and his failure to fully report them on his May 30, 2002 SF 86, in response to Questions 24 and 27. I have considered his various explanations. He is now about 26 years old and a candidate for Ph.D.

Applicant began using marijuana when he was 16 (i.e., in about 1994). When he was in college, he used it about twice a week (Tr at 35, 37). He stopped using it just before he began working for his present employer, which would be in about the spring of 2001 (Tr at 38). He completed his SF 86 in May 2002, about a year after he stopped using marijuana, but nevertheless claimed a last use of July 1998, some four years earlier. His last use of cocaine (seventh time) appears to have been in July 1998 (Tr at 38, 39).

SOR 1.(a)(1) - In July 1998, Applicant was about 20. He was told by his lawyer that there were "potentially multiple things" he could be charged with. He was aware of the charge to which he pleaded guilty - Driving Under the Influence/Drugs, but he was not told he had been charged with any other crime, such as the Possession of Marijuana alleged in the SOR. He claims he did not report the charge because he was unaware of it when he completed the SF 86 (Tr at 27-29).

SOR 1.(a)(2) - In July 1997, he was arrested and charged with Possession of Alcohol as a Minor. This was just prior to

his being hired by his present employer and he "wanted to put [the incident] out of his life" and he was "concerned about how it would affect [his] Security Clearance and [his] employment, and [he] is very sorry for that. I wish I could have gone back now" (Tr at 30-32). He did provide the truth to the DSS agent, knowing it was in conflict with what he had put in writing (Tr at 31).

SOR 1.b. - Applicant doesn't know why he omitted any mention of the Under the Influence as a Minor offense in 1997. He knew he should have done so (Tr at 42). He was a passenger in a car driven by a friend. While being pursued by the police, Applicant spilled the beer he had been drinking, threw the cup out of the car and hid some marijuana on his person and took it to his house to keep the friend from getting into more trouble with the police. A short time later, Applicant "got smart" with the police and was handcuffed and placed in the police car and was taken to a "detox" center for the night. Applicant's father was a police officer and the matter was not pursued past that point (Tr at 48).

SOR 1.c. - Applicant knew he was lying when he stated a last use of marijuana as being in 1998, when he knew he had continued using it until June 2001 (Tr at 43). During his interview with DSS on March 27, 2003, the agent asked Applicant if there was anything else he wanted to say about his drug use and Applicant then mentioned the previously omitted information (Tr at 44-46). Since Applicant provided the information only after being prompted by the DSS agent, he has not demonstrated the applicability of Mitigating Condition 3.

Applicant claims that since his undergraduate days, he no longer uses drugs and drinks only on occasion (Tr at 49). Based on the personal history he describes, he appears to be an intelligent and athletic person with great ability when he chooses to apply himself. The flaw in his character appears to be his tendency toward ignoring his own best interests and allowing himself to exercise questionable judgment when he should know better. The number and variety of falsifications makes it impossible to ascertain the credibility of his claims as to any single allegation. It is basis to the DoD adjudication process that since holding a security clearance is a privilege and not a right, it is his ultimate burden to prove he is eligible and not for the Government to prove him ineligible.

Disqualifying Condition 2 (the deliberate omission, concealment or falsification of material facts from any personnel security questionnaire (SF 86)) is clearly applicable as is DC 5 (a pattern or history of dishonesty or rule violations). Based on all of the available evidence, I conclude that the falsifications are both serious and current. Moreover, Applicant has not overcome the negative impact of the Government's evidence by any sufficient evidence of mitigation. In fact, I concluded that none of the cited possible mitigating conditions have been demonstrated by Applicant to exist.

The concerns are stated only under Guideline E (Personal Conduct) and not under the alcohol and/or criminal conduct-related guidelines. Therefore, this decision is based on my application of the Findings of Fact only to the standards stated in Guideline E. However, the nature of the conduct deliberately omitted from the SF 86 is clearly relevant in determining how seriously the falsifications should be viewed, in determining the levels of judgment, reliability, and trustworthiness possessed by Applicant. None of his explanations and/or excuses reduces the negative impact of his series of falsifications or demonstrates his current eligibility 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 E (Personal Conduct) Against the Applicant

Subparagraph 1.a.(1) Against the Applicant

Subparagraph 1.a.(2) Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. 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