

DATE: October 16, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-05439

**DECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I .Goldstein, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The recency and extent of applicant's intentional falsifications of material facts on a Security Clearance Application (SCA) requires a denial of his clearance request. Clearance is denied.

**STATEMENT OF THE CASE**

On January 31, 2006, 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 administratively reissued on April 20, 1999), issued a Statement of Reasons (SOR) to applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on April 20, 2006. The case was assigned to me on July 19, 2006. A Notice of Hearing was issued on August 22, 2006, and the hearing was held on September 19, 2006. The transcript was received on September 29, 2006.

**RULINGS ON PROCEDURE**

At the hearing, Department Counsel moved to amend SOR Paragraph 1b. Applicant did not object, and the motion was granted. As amended, SOR Paragraph 1b now alleges that applicant pleaded guilty to a reduced charge of sexual battery.

**FINDINGS OF FACT**

Applicant is a 39 year old employee of a defense contractor. He served in the U.S. Navy from 1985 to 1995.

In September 1988, applicant was awarded non-judicial punishment under the UCMJ for Unauthorized Absence and

## Dereliction of Duty.

In January 1989, applicant was awarded non-judicial punishment under the UCMJ for Unauthorized Absence.

Applicant married his current wife in 1990. Beginning about a year after they were married, and continuing to March 1999, applicant and his wife were involved in numerous domestic disputes, sometimes involving physical violence.

In January 1991, applicant was arrested by civilian authorities and charged with Inflicting Corporal Injury on Spouse and Battery.<sup>(1)</sup> He pleaded guilty to Battery, and was placed on probation for three years and ordered to attend a domestic violence program. Applicant attended the program as ordered.

In 1994, applicant was awarded non-judicial punishment for violating Articles 92, 107 and 128 of the UCMJ (Domestic Assault and Damage to Government Property).

In March 1999, applicant was arrested and charged with Spousal Abuse. He went to trial on

the charge and was acquitted. Applicant testified that there have been no further incidents of physical violence involving his wife, and there is no evidence to the contrary (TR at 74-75).

In 1996, applicant received a speeding ticket. In 1998, he received a second speeding ticket. Because he did not appear in Court as required for either ticket, at least one warrant for his arrest was issued. When he was arrested in 2001 (discussed below), these tickets caught up with him. As the result of the tickets and his failure to appear in Court, applicant was fined and ordered to serve one day in jail.

In 2001, applicant was arrested and charged with three felonies involving an alleged sex crime against his stepdaughter.<sup>(2)</sup> He eventually pleaded guilty or no contest to a reduced misdemeanor charge.<sup>(3)</sup> He was fined \$100.00, sentenced to ten days in jail/work release, placed on probation for three years, and was ordered to complete 18 counseling sessions. The stepdaughter had claimed applicant had inappropriately kissed her on three occasions. Applicant denies he did so. He pleaded guilty because he had already spent \$9,000.00 on attorney fees and had no more money to go to trial. He just wanted it to "go away" (TR at 76). He subsequently formally adopted this stepdaughter. Other than a speeding ticket, which he has taken care of, applicant has had no adverse contact with law enforcement since this incident.

The SOR alleges that applicant intentionally provided false, material information to the Government in response to two questions on an SCA (Questions 21 and 26) he executed on September 5, 2003 (Exhibit 5). In response to Question 21, he denied that he had ever been charged with a felony. This was not true because, as noted above, he was originally charged with three felonies in connection with the incident involving his stepdaughter in 2001. Applicant denies he intentionally provided the false information. When asked at the hearing why he stated "no" in response to Question 21, applicant testified:

Well, because I didn't think I had ever been charged with a felony. I believe that when I was charged with these original felonies, that they were dismissed, and the new charge of a misdemeanor was being applied. That's why I answered later on "yes" [in response to Question 26] and I gave the indication of the same case. I didn't believe I was being charged with a felony (TR at 60-61).

In fact, in response to Question 26, which asked, in essence, if during the previous seven years he had been arrested for, charged with, or convicted of any offenses not previously disclosed in response to earlier questions, applicant did report the sexual misconduct incident, albeit as Simple Battery. Although applicant should have reported this incident as a felony in response to Question 21, instead of Simple Battery in response to Question 26, had this been applicant's only misrepresentation, there may have been grounds to accept his testimony that he did not intend to conceal the fact he was charged with a felony. However, as alleged in the SOR, the evidence also establishes that applicant failed to disclose his 1999 arrest for Spousal Abuse in response to Question 26. Applicant testified that he didn't disclose this incident because he thought when you are found not guilty, it's "not applicable . . . It's like it didn't - to me I just assumed that it didn't happen" (TR at 63). This testimony was not credible. Adding to the doubts about applicant's credibility is the fact that in an application for Federal employment in 1995 (Exhibit 10), applicant denied that during the previous 10 years

he had "been convicted" or had "been on probation." In fact, as noted above, he had been convicted of Battery in 1991 and had been placed on probation. When asked why he did not disclose the conviction or probationary status, applicant stated, "I don't know" (TR at 68-69).

### CONCLUSIONS

With respect to Guideline J, the evidence establishes that applicant was convicted of Battery in 1991 and of a misdemeanor charge of either Sexual Battery or Simple Battery in 2001. The evidence further establishes that applicant intentionally provided false, material information in response to two questions on an SCA he executed in 2003. Although he was never charged with a crime, these falsifications are felonies under 18 U.S.C. 1001. This conduct reflects adversely on applicant's judgment, reliability and trustworthiness, and requires application of Disqualifying Condition E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*).

The physical altercations between applicant and his wife apparently ended in the 1990s. This conduct, as well as the alleged incident involving his stepdaughter, which most likely didn't happen as she claimed, would have been mitigated had applicant not engaged in any further criminal conduct. However, as noted above, applicant's intentional falsifications of material facts on the SCA were felonies. This fact precludes application of any mitigating factors, and given the recency and extent of the conduct, precludes a finding under Guideline J that it is clearly consistent with the national interest for applicant to have access to classified information at the present time.

With respect to Guideline E, applicant's falsifications of material facts on the SCA are extremely troubling. The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a security clearance application, it is extremely difficult to conclude that he or she nevertheless possesses the good judgment, reliability and trustworthiness required of clearance holders. Applicant's intentional falsifications require application of Disqualifying Condition E2.A5.1.2.2 (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . .*). No Mitigating Conditions apply. Based on the foregoing, Guideline E is found against applicant.

Guideline D is found for applicant. Although he was originally charged with three felonies in connection with the alleged incident involving his then stepdaughter, he eventually pleaded guilty to one misdemeanor (which may not even involve sexual behavior), and received a relatively minor sentence. Had there been any real credible evidence to support the original charges, the plea agreement would have never happened. The fact that he subsequently legally adopted the girl adds further doubt to the legitimacy of the original charges. In any event, this incident does not support a finding of "Sexual Behavior."

### FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

PARAGRAPH 2: AGAINST THE APPLICANT

PARAGRAPH 3: 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.

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Joseph Testan

Administrative Judge

1. The evidence does not support a finding that this charge was a felony as alleged in the SOR.

2. SOR Allegations 1a and 1b reference the same incident.

3. It is unclear if the reduced misdemeanor charge was Simple Battery or Sexual Battery. (TR at 41-47; Exhibit 7; Applicant's SOR Response.)