

DATE: October 31, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-03834

**ECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

**SYNOPSIS**

Applicant was convicted of felony aggravated robbery in October 1977. He disregarded advice from company security personnel to be honest and elected to not disclose that offense on his October 2002 security clearance application. Furthermore, Applicant is statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986 since he was incarcerated for over two years for the robbery. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on November 2, 2005, detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on December 13, 2005, and elected a decision without a hearing. The government requested a hearing on January 5, 2006, in accord with ¶ E3.1.7 of the Directive. The case was assigned to me on April 5, 2006, with a motion pending from the government to amend the SOR to allege that Applicant was statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986. Applicant was ordered to respond by April 28, 2006, or the amendment would be granted. On April 25, 2006, Applicant admitted the allegation. Accordingly, the SOR was amended to add ¶ 2.b under Guideline J.

A notice was issued on April 27, 2006, scheduling a hearing for May 15, 2006. With the consent of the parties, a hearing was convened on May 16, 2006, pursuant to amended notice of May 4, 2006, to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Six government exhibits (Ex. 1-6) [\(1\)](#) and ten Applicant exhibits (A-J) were admitted and testimony was taken from Applicant, as reflected in a transcript (Tr.) received by DOHA on May 26, 2006.

The record was held open until May 30, 2006, following the hearing for Applicant to submit additional documentation.

By facsimile on May 18, 2006, Applicant's supervisor forwarded a character reference supporting Applicant's clearance. The government filed no response by the May 26, 2006, due date. Accordingly, the document was marked and admitted as Exhibit K.

### FINDINGS OF FACT

Under the SOR as amended, Applicant was alleged under Guideline E to have deliberately falsified his October 2002 security clearance application (SF 86) by failing to disclose that he had been convicted of an October 1977 aggravated robbery for which he was sentenced to five years imprisonment. Applicant was alleged under Guideline J to have committed a felony violation of 18 U.S.C. § 1001 by falsely denying on his SF 86 that he had ever been charged or convicted of a felony offense, and to be disqualified from having a clearance granted or renewed under 10 U.S.C. § 986 because he spent more than one year incarcerated for the robbery offense. Applicant admitted the allegations, which are incorporated herein as findings of fact. After a thorough review of the pleadings, admitted exhibits, and hearing transcript, I make the following additional findings:

Applicant is a 44-year-old senior planner who has worked for a defense contractor since September 2002. He seeks to retain a secret clearance that he has held throughout his employ, having been granted a secret-level clearance when he was on active duty in the U.S. Navy.

Four days after he turned 15, Applicant acted as a lookout while two companions robbed a store of \$467 by gunpoint (.22 caliber weapon) in April 1977. All three were apprehended by a sheriff as they walked down a rural road. Applicant was arrested and charged with aggravated robbery (Class A felony punishable by imprisonment of five to 50 years and a fine up to \$15,000) and theft of property (Class B felony). On October 17, 1977, Applicant pleaded guilty to the aggravated robbery and was sentenced to five years in the custody of the state department of corrections. He was incarcerated in a state correctional facility, where he was placed on a chain gang.<sup>(2)</sup> When in the barracks he played cards and gambled, but before long he felt "conflicted" because he had been raised in a spiritual home. Applicant began working with the prison chaplain, taking correspondence courses in religion. Due to his hard work on the chain gang, he was transferred to auto mechanic duties where he remained until shortly before he was paroled on January 3, 1979. On January 2, 1982, he was discharged from his parole by reason of expiration of sentence.

Following his release from prison, Applicant returned to high school and earned his diploma. In mid-December 1980, he was first appointed a pastor in a Christian denomination. In March 1982, Applicant entered on active duty in the United States Navy. In conjunction with his enlistment, he was interviewed about his criminal past on March 3, 1982. Applicant admitted he had cooperated with his accomplices' scheme and was convicted of aggravated robbery, for which he served one year and two months in a state reformatory.

Applicant served as a hull maintenance technician (surface warfare) in the U.S. Navy and as a part-time minister in his church. He was granted a secret-level clearance for his duties as a nuclear welder in August 1985.

While serving overseas, Applicant was involved in an accident in February 1996 after drinking two large glasses of wine on the military installation. A breathalyzer test confirmed he was legally intoxicated (Tr. 69). Charged with DUI, he went before a Captain's Mast and was fined \$500, suspended in rate for six months, and ordered to attend a Level II alcohol awareness program.

On March 3, 2000, he earned his sixth good conduct award. After twenty years in the Navy, he was transferred from active duty into the fleet reserve at the rank of first class petty officer (E6) on March 31, 2002.

Before his retirement from active duty, Applicant assisted in the transition of the naval support facility's hull repair division from military to civilian. Hired to fill one of the vacant civilian planning positions, Applicant began working for his current employer in September 2002. On October 25, 2002, Applicant completed a security clearance application (SF 86, EPSQ version), for a reinvestigation for his secret clearance. Applicant responded "NO" to question 21 concerning any felony offenses ["Have you ever been charged with or convicted of any felony offense?"], but listed his 1996 DUI in response to questions 24 (any alcohol or drug offenses) and 25 (subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice in the last seven years).

On September 29, 2003, Applicant was interviewed by a special agent of the Defense Security Service about his arrest record and failure to disclose the felony on his SF 86. Applicant admitted he had served when he was 14 [sic] in 1977 as a lockout for his two friends while they robbed a store at gunpoint. As a result, he was sentenced when he was 15 to five years in a state correctional facility, but was paroled in 1979 after serving two years. Applicant indicated with respect to the omission of the felony offense:

When I entered the USN, I disclosed the robbery arrest and was told that the USN was unable to locate information on same. Before completing my [company initials omitted] application, I inquired with the [city and state omitted] police and city hall and again no information was available on this arrest. Therefore, I decided not to list this arrest because no information seemed to be available.

I did not purposely leave my felony arrest information off of my EPSQ to hide such from DoD. I have nothing to hide. In fact, I often use this incident as an example for younger people in my capacity as a part-time minister. (Ex. 5)

At his hearing, Applicant testified he got confused because previous checks he had done while in the Navy in 2000 or 2001 when he held a secret clearance indicated nothing on his record ("I had a secret clearance all the way through, and when I went to legal and I asked some of the legal advisors about it, they said no, you don't have to worry about anything."). After being given the form by his employer, he asked the company's security department to clarify "does this mean if you were ever" without revealing the offense. He was told only that he had to be honest in his answers. (Tr. 33, 59-60) With that advice, he decided not to list his felony conviction:

So, in doing so, I figured if I did put it down, and they would ask me, if they said they didn't see anything, well why did you put it down? If I didn't, then they would start digging, so I just went ahead and answered no, and that is the honest reason why I did that. (Tr. 33)

On cross-examination, he denied that he had omitted the felony conviction out of concern for his clearance, and reiterated that he had not disclosed it because it wasn't documented in his military record:

I understood the question, but being that I didn't see anything, I was wondering, I spent a year and a half of my life incarcerated, yes, and I didn't deny that, and I was open about telling anyone who wanted to know or needed to know about it, but I was trying to figure why it wasn't there and, if it's not, then they won't see it, is what I thought. (Tr. 62)

As of his completion of his SF 86, he had not informed anyone at his place of employment about his felony conviction. (Tr. 77)

In May 2005, Applicant's ministerial credentials were accepted by a denomination in his current region, and he was appointed pastor of a church. Applicant has performed his duties for his defense contractor employer in a professional manner. His supervisor has found him to be "a trustworthy employee and a man of integrity." Applicant was commended by the commanding officer of the naval support facility for superior performance of his duties from September 2002 to April 2003 as preventative maintenance system coordinator for the five USNR detachments assigned to the naval support facility.

### POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## CONCLUSIONS

### **Guideline E--Personal Conduct**

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. Although Applicant disclosed his 1996 DUI on his October 2002 security clearance application, he omitted his very serious, albeit dated, conviction for felony aggravated robbery in 1977 when he was 15 years of age. Disqualifying condition (DC) ¶ E2.A5.1.2.2. *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security eligibility or trustworthiness, or award fiduciary responsibilities*, is implicated in the absence of inadvertent omission, good faith misunderstanding as to whether a given offense fell within the scope of the question, or other cause negating the knowing and willful intent required.

In 2000 or 2001, when he was still in the Navy, Applicant checked with the legal department and was told they had no record of his offense. Uncertain in October 2002 whether he should report his felony conviction on his SF 86, Applicant contacted the local police and municipal authorities where he had committed the crime and they had no records on file. Unsure as to his reporting obligation, Applicant then acted appropriately in inquiring of his employer's security department. However, after being advised to respond honestly, Applicant made the wrong choice and denied any felony offense. While he claims to have had no intent to conceal his conviction, there is no question the omission was knowing and willful, likely because he did not want to prompt inquiries from security or his employer about his past ("I wondered to myself that if I put down that I had a record this would give security a reason to question me about it." *See* Answer; "It would cause them to just start digging is what I figured . . . . Tr. 62). It is noted that Applicant was not specific with security when he asked for advice ("I didn't tell her the actual . . . ." Tr. 60), and he did not reveal it when he was hired (Tr. 61). Accordingly, there is a reasonable basis to apply DC ¶ E2.A5.1.2.4. *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if know, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*.

None of the corresponding mitigating conditions apply. He disclosed his participation in the robbery and subsequent conviction during a DSS interview of September 29, 2003, but there is no evidence that he volunteered the information. Applicant's account of the interview indicates some confrontation:

I must admit that my decision wrestled with me ever since I submitted that security statement on whether I responded correctly or not. Until one day in 2003 an Investigator concerning the matter approached me. He explained to me about my decision I chose involving the security infraction, and asked me did I still hold my decision to be a true statement. I explained to him the same as I am explaining to you now.

He repeated his question and I told him, "no, I do not maintain that I do not have a record, I have a record." He asked me did I try and conceal the truth because I was afraid of not being hired. I told him no and explained again. He then told me that whenever someone has a felony record the FBI keeps the record on file. <sup>(3)</sup>

Moreover, it comes as too belated to qualify as a prompt rectification under MC ¶ E2.A5.1.3.3. *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*. Even if Applicant has candidly disclosed his criminal past in his ministry to youth, there is no evidence he has eliminated the vulnerability issues that arise through concealment of his past from his employer.

## Guideline J--Criminal Conduct

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. In addition to raising personal conduct concerns, Applicant's knowing, false response to question 21 on his SF 86 constitutes a felony violation of 18 U.S.C. § 1001. (4) DC ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses* apply. While his October 2002 false statement was not recent (¶ E2.A10.1.3.1), doubts persist as to whether his representations can be relied on. Applicant indicated in his Answer that when he spoke to company security personnel who had given him the SF 86, "[he] explained to them that twenty-five years earlier [he] had been arrested for a felony." His hearing testimony indicates his inquiry was general in nature rather than specific to his situation:

A . . . I asked one of the ladies how should I, and I said, well, I don't know if I should explain this to you, and I said if you've ever been convicted of something? And she just said I cannot answer that for you, you must answer and be honest about it. (Tr. 60)

Moreover, his stated rationale for then not listing the offense ("I wondered to myself that if I put down that I had a record this would give security a reason to question me about it") belies his claim that he had informed security personnel of his felony arrest. I am unable to conclude that ¶ E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*, applies.

Despite Applicant's youth at the time of the robbery and the passage of almost 30 years since its commission, his felony conviction continues to raise Guideline J concerns because of his sentence. Since he was incarcerated for more than one year, he cannot be granted a security clearance under 10 U.S.C. § 986 (c)(1), *The person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year*, absent a meritorious waiver. (5)

## Whole Person Analysis

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." ¶ E2.2.1. The security risks presented by Applicant's aggravated robbery and his lack of candor on his SF 86 about the offense (*see* ¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*), must be evaluated in the context of the "whole person." After he was released from incarceration, Applicant became a productive member of society. He finished high school, became a pastor in his church, and served honorably for 20 years in the service of our country. He continues to contribute to the defense effort as a senior planner for a defense contractor, and has been very professional in carrying out his duties.

Yet, while Applicant has made positive changes in his behavior (¶ E2.2.1.6. *The presence or absence of rehabilitation and other pertinent behavioral changes*) since the criminal conduct of his youth (¶ E2.2.1.4. *The individual's age and maturity at the time of the conduct*), he exhibited extremely poor judgment in driving drunk in 1996 and in lying on his SF 86 after he had been told by security personnel to be honest. While I can appreciate Applicant's desire to put his past behind him, the government must be assured that those granted access can be trusted to fulfill their obligations, including those of complete candor. When asked about his DUI at his hearing, Applicant testified he "indulged in just one drink" before his arrest (Tr. 68). He told a DSS agent in September 2003 that he had consumed two large glasses of Merlot wine. Doubts persist for his judgment, reliability, and trustworthiness, separate from the issue of the statutory disqualification under 10 U.S.C. § 986.

## FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

**DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. Department Counsel represented that there were no material differences between Ex. 1 and Ex. 2 (Tr.22). Ex. 1 is the signed copy of the SF 86 executed on October 25, 2002. Ex. 2 is the electronic version, unsigned, that was apparently generated October 28, 2002. Ex. 2 included the national agency check information that was not included in Ex. 1. On further review of Ex. 1, it consists of 11 pages as represented by Department Counsel, but missing from the document is page 2 of the SF 86 (questions 4, 5, and 6). Ex. 2 contains a complete copy of the SF 86 (albeit an unsigned version).

2. Applicant testified it was a minimum security facility for inmates up to age 21. If the offense was serious, the inmate would be transferred to another correctional facility on reaching age 21. Children under age 14 would be placed in a reformatory. (Tr. 51-52) He later explained that even in the barracks, there were two officers there at all times walking around. Inmate activity was highly structured, with certain times when they were allowed to shower, go to commissary:

We were never able to go anywhere without officer escorts and even when we went to the field, it was strict. We had to be up at certain times in the morning, fully dressed, head to the fields. We didn't have chains on us, we just had our hoes, and we would line up and we had our men on horses with guns watching us and we would clear land. (78-79)

Applicant's fingerprint card (Ex. 4, p.6) indicates "INTERMEDIATE REF." This may well mean that Applicant was an inmate in a state reformatory.

3. See Applicant's Answer.

4. 18 U.S.C. § 1001 provides in part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

5. As of the issuance of the SOR, Section 986 provided in pertinent part:

§ 986. Security clearances: limitations

(a) Prohibition.--After October 30, 2000, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons disqualified from being granted security clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year.

(d) Waiver Authority--In a meritorious case, an exception to the prohibition in subsection (a) may be authorized for a person described in paragraph (1) or (4) of subsection (c) if there are mitigating factors. Any such waiver authority may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.