

DATE: October 24, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 04-11939

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

Robert Barrett Wities, Esquire

Gaglione Law Group

**SYNOPSIS**

This 38-year-old engineer has a history of alcohol problems that ended in early 2003. His rehabilitation is attested to by his successful completion of a treatment program, and by three years of abstinence, favorable testimony from others, and letters of recommendation. He did not intentionally falsify his answer to Question 24 on his SF 86. Mitigation has been adequately established. Clearance is granted.

**STATEMENT OF THE CASE**

On August 18, 2005, 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 September 13, 2005, 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. On January 19, 2006, Applicant changed his mind and asked for hearing before a DOHA Administrative Judge. The case was assigned to me on February 10, 2006. A Notice of Hearing was issued on April 28, 2006, and the hearing was conducted on June 2, 2006. At the hearing, Department Counsel introduced ten (10) exhibits (Government's Exhibits (GX) 1-10). Applicant testified, called five other witnesses, and introduced 27 exhibits (Applicant's Exhibits (AX) A -AA). The hearing transcript was received at DOHA on June 13, 2006.

**FINDINGS OF FACT**

Applicant is a 38-year-old design engineer for a defense contractor. [\(U\)](#) The SOR contains 12 allegations under Guideline G (Alcohol); one allegation under Guideline E (Personal Conduct), and two allegations under Guideline J (Criminal Conduct). Applicant admits allegations 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.i., 1.j., and 1.k., with explanations. He denies allegations 1.a., 1.h., and 1.l., also with explanations. He admits and denies different parts of 2.a.(1). He admits 3.a., and does not specifically admit or deny 3.b., which I deem a denial. All specific admissions are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence, I make the following additional FINDINGS OF FACT as to the status of each SOR allegation.

### ***Guideline G (Alcohol)***

As specified in the SOR,

1.a. - Applicant has a history of consumption of alcohol, at times to excess and to the point of intoxication, from about 1983 (age 15) to at least July 2003;

Alcohol-related arrests, as follows:

1.b. November 1988 in California - Driving Under the Influence of Alcohol (DUI);

1.c. - 1990 in Missouri - DUI;

1.d. - 1992 in California - DUI and DUI with .08% or higher alcohol, with prior;

1.e. - December 1995 in California - DUI with prior

1.f. - October 1996 in California - DUI Alcohol and/or Drugs;

1.g. - June 2000 in California - DUI Alcohol and/or Drugs;

1.h. - Applicant received an assessment on about May 18, 2001 at a Substance Abuse Treatment Center of Alcohol with Consequences and Dependence. He was encouraged to get involved in an alcohol treatment program and was offered a referral, which he declined.

1.i. - Applicant was cited in or about 2003 and charged with Open Container;

1.j. - Applicant received treatment from about June 2003 to August 6, 2003 at an Outpatient Treatment and Recovery Program in California (AX A). He was discharged for noncompliance with program rules for not attending on time or as scheduled and not providing verification of attending 12-Step meetings (GX 9). However, within two weeks (August 22, 2003), Applicant became enrolled in a different program, which he successfully completed in early 2004 (AX A, Tr at 94-96).

1.k. - Applicant received outpatient treatment from about January 2003 to January 2004 at an Outpatient Program in California. His prognosis on January 2004 was that he had a moderate problem, some treatment required.

1.l. - Applicant received outpatient treatment from about January 2004 to August 2004 at the same Outpatient Program in California. A letter from the treatment center, dated August 5, 2004, states that Applicant completed after care on that date, had successfully completed all requirements, and had tested negative in all urinalysis tests taken during that period (AX A).

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

2.a. - Applicant falsified material facts on a security clearance application (SF 86) executed by him on July 8, 2003, in which he responded to Question "**24 Your Police Record - Alcohol/Drug Offenses**" [have you ever been charged or

convicted of] by deliberately failing to mention the alcohol and/or drug offenses cited in 1.b., 1.c., 1.d., 1.e., 1.f., and 1.i. above and as set forth in 3.a and 3.b., below. He also omitted any mention of his being cited/warned about his possession of marijuana in early- or mid-1990s (GX 3 at page 5 and TR at 28).

#### Guideline J (Criminal Conduct)

3.a. - The information set forth in 2.a., above, constitutes a violation of 10 U.S.C. 1001, a felony.

3.b. - The SOR alleges that Applicant was cited in January 3, 2003 in State A, and charged with Misuse of Telephone, Use of Slugs. The SOR also alleges that Applicant was fined \$90.00. Applicant's denied the use of any slugs, and describes the incident as his getting off a trolley and giving his pass to a lady who was trying to board, but who was being denied entrance onto the trolley by an officer because she had no ticket. Applicant was seen by the officer and told what he was doing was illegal (Tr at 97-98). In context, I find no security clearance implications.

Applicant served on active duty in the U.S. Navy from 1987 to 1990, at which time he received an Honorable Discharge and joined the Reserves. He remained enlisted until 2002, when he sought a commission, and became an Ensign in late 2002 (GX 3 and AX D. Applicant has obtained command support and has submitted letters he received in late 2002 from his ranking officers, in support of his being commissioned (AX E, AX F). The letters describe Applicant as a man of mature demeanor, a talent for leadership, desire to motivate, honest and unambiguous, and highly motivated. He has numerous awards and certificates and his most recent Fitness Reports evaluate him as "above standards" or "greatly exceeds standards" (AX L). In February 2006, the Commanding Officer of his unit describes him as a "highly motivated individual" and gives Applicant "my strongest recommendation for selection . . . to the Naval Postgraduate School" (AX M).

Applicant called five witnesses (Tr at 34-82), who have known for some years. Uniformly, they speak very highly of him, consider him to be a conscientious person, and have not seen him consume, or be under the influence of, alcohol, particularly during the past four years or so (Tr at 47). His former brother-in-law saw him when he was drinking, but remarked about the remarkable turnaround over the past several years, in which Applicant stopped drinking and focused on his education and career (Tr at 52). Applicant is working on his Master's Degree in Engineering and has recently been promoted to Lieutenant (Tr at 53). His ex-wife, who remains a friend, agrees that Applicant has not consumed alcohol for the last three years (Tr at 60). She adds that Applicant "is not even the same person. He's grown up, he's matured, he's very responsible now" (Tr at 61).

#### Guideline E (Personal Conduct)

Applicant's explanation for why he mentioned only the 2000 DUI and omitted any mention of the earlier ones is one of carelessness. At the time he completed his SF 86, he was under a lot of stress because of his divorce (Tr at 91) and thought the question asked about arrests within the previous seven years. This is not an unheard of explanation in Guideline E cases, and each one must be evaluated on the facts and circumstances of the individual case. On the one hand, some of the nearby questions on the SF 86 do have a seven year limitation, while others ask "have you ever."

In this case, whether Applicant's explanation is credible or not does not rest solely on whether I believe him or not. There are other factors I find helpful and, ultimately persuasive. (1) He did seek to hide all of his DUI arrests. He did report the DUI arrest that occurred within the previous seven years. The record suggests Applicant is mature and intelligent enough to understand that whatever chance there might be the investigators would not learn about all of his DUIs would vanish once they checked for details about the one he admitted. (2) His record of accomplishment since rejoining the Navy and the praise for his character attested to by those who know him strongly suggest he is a man who would not seek to deceive the Government.

### **POLICIES**

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. 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 G (Alcohol)

The evidence shows that Applicant began consuming alcohol in about 1983 and continued doing so until at least July 2003 (SOR 1.a.). On at least six occasions, in 1988, 1990, 1992, 1995, 1996, and 2000, he was arrested on alcohol-related driving violations (SOR 1.b.-1.g.). In May 2001, he received an assessment of Alcoholism with Consequences and Dependence (SOR 1.h.). In 2002, he was cited with Possession of a Open Container (SOR 1.i.). He claimed he was holding the container for a friend, but he does not deny having it in his possession (GX 3at page 4)<sup>(2)</sup>

He subsequently received alcohol-related treatment in June 2003 (SOR 1.j.), from September 2003 to January 2004 (SOR 1.k.), and from January 2004 to September 2004 (SOR 1.l.). Applicant's last use of alcohol was in July 2003 (GX 3), but he continued outpatient treatment until August 2004. The record makes a strong case that Applicant has now matured to the extent that he can safely be relied upon to exercise the good judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

*Alcohol Consumption - The Concern:* Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

*Disqualifying Conditions:* E2.A7.1.2.1. Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use; E2.A7.1.2.4. Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

*Mitigating Conditions:* E2.A7.1.3.1. The alcohol related incidents *do* indicate a pattern; but E2.A7.1.3.2. The problem occurred a number of years ago and there is no indication of a recent problem; E2.A7.1.3.3. Positive changes in behavior supportive of sobriety; E2.A7.1.3.4. Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least

12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program (AX A).

### Guideline E (Personal Conduct)

As discussed above, Applicant's explanation for the sole error of omission alleged in his SF 86 comes down to an error of understanding, in that he thought he "needed to list things going back only seven years." He did not notice the specific language of the question. In context, I find his explanation to be credible in context..

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.

Disqualifying Conditions - None are established by the facts. As to DC 2, I conclude the omission was not deliberate, but assuming arguendo that it was, I conclude that:

Mitigating Condition (MC) E2.A5.1.3.2. is also generally applicable, in that the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

Guideline E - I conclude that the false answer was not deliberately entered and, therefore was not a criminal violation. The remaining allegation, (3.b.) describes conduct that certainly qualifies as a lesser offense.

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

Disqualifying Conditions that could raise a security concern and may be disqualifying include: E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged; However, E2.A10.1.2.2 is not applicable since the record shows, at most, a single "lesser offense."

Mitigating Conditions: E2.A10.1.3.1. The criminal behavior was not recent; E2.A10.1.3.2. The crime was an isolated incident; E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person.

Under the Whole Person Concept: Each adjudicative decision must also include an examination of nine generic factors relevant the conduct, to include: (1). Nature and seriousness of the conduct and surrounding circumstances. (2) Frequency and recency of the conduct. (3) Age of the applicant. (4) Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved. (5) Absence or presence of rehabilitation. (6) Probability that the circumstances or conduct will continue or recur in the future;

I have considered all nine factors, individually and collectively, in reaching my overall conclusion. The Whole Person Concept allows an evaluation of facts and circumstances that do not always fit squarely within the specific Disqualifying and Mitigating Conditions of Guidelines G, E, and J.

This is not a case where a decision must be made primarily on information received only from the Applicant. Rather, other solid evidence of Applicant's conduct *and* the opinions of a number of highly responsible individuals establishes that Applicant is not the same man he was three years ago. His rehabilitation from alcohol use is attested to by a number of responsible individuals with the opportunity to know. His dedication to the Navy and his substantial maturation is firmly established by his efforts to obtain a Master's Degree in Engineering, his promotion to Ensign and now Lieutenant, and the endorsement of men who work closely with him on a frequent basis. His unquestionable progress is even more remarkable in that Applicant is a man of 38, and who indicates an intent to go even farther in his life and career. All in all, I find little risk of his sliding back into the habits that caused him problems in the past.

Rehabilitation and maturity has been clearly established. Applicant has demonstrated that he currently possesses the judgment, reliability, and trustworthiness required of someone seeking a DoD security clearance.

### **FORMAL FINDINGS**

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

*Guideline G (Alcohol)* For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. For the Applicant

Subparagraph 1.i. For the Applicant

Subparagraph 1.j. For the Applicant

Subparagraph 1.k. For the Applicant

Subparagraph 1.l. For the Applicant

*Guideline E (Personal Conduct)* For the Applicant

Subparagraph 2.a. For the Applicant

*Guideline J (Criminal Conduct)* For the Applicant

Subparagraph 3.a. For the Applicant

Subparagraph 3.b. For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**

1. He is also a Lieutenant in the U.S. Navy Reserves.

2. . Applicant states he was stopped in 2003 for holding an open container that held only "Snapple," a non-alcoholic drink. He paid a fine of \$50, apparently for Possession of a Glass Container in a park.