

DATE: August 18, 2006

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In Re:

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SSN:-----

Applicant for Security Clearance

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CR Case No. 05-09052

## **DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

#### **FOR APPLICANT**

Paul C. Johnson, Esquire

### **SYNOPSIS**

This 31-year-old engineer was arrested and convicted of misdemeanor theft in 1973 and was cited for possession of a glass bottle on a beach in 2003. The SOR incorrectly alleged the 1973 incident to be a felony and the 2003 incident to involve alcohol, neither of which is shown by the record. Likewise, the allegations about falsifications on his security clearance application are unsupported since the underlying allegations have not been shown to be correct. Clearance is granted.

### **STATEMENT OF THE CASE**

On January 15, 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 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 February 8, 2006, 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 case was assigned to me on April 10, 2006. A Notice of Hearing was issued on May 2, 2006, and the hearing was conducted on June 1, 2006. At the hearing, Department Counsel introduced two (2) exhibits (Government's Exhibits (GX) 1 and 2). Applicant testified, called three other witnesses, and introduced twelve (12) exhibits (Applicant's Exhibits (AX) A - L). The hearing transcript was received at DOHA on June 8, 2006.

### **FINDINGS OF FACT**

Applicant is a 31-year-old engineer. The SOR contains three (3) allegations under Guideline J (Criminal Conduct) and three allegations under Guideline E (Personal Conduct). Applicant admits allegation 1.b. He denies allegations 1.a., 1.c.,

2.a., 2.b., and 2.c. 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 J (Criminal Conduct)***

1.a The SOR alleges that in about March 2003, Applicant was cited for possessing an Open Container of Alcohol in State A. At the hearing, based on the testimony of the OPM investigator, the allegation was amended to a 'Violation of a Glass Bottle [on the beach] ordinance. He was fined \$40.00. Neither of the Government's Exhibits (1 or 2) contains any mention of this 2003 incident. Applicant admitted the incident, but denies it was alcohol-related. His explanations are accompanied by documentation that the violation pertained to his possession of a glass container on a public beach, with no reference to the contents, if any, of the container (AX F at page 3). The Government has not carried its initial burden of establishing that an alcohol-related violation had taken place. I conclude that the violation contains minimal, if any, security significance.

1.b. On May 14, 1997, Applicant was arrested in State B on two counts of Burglary. On July 15, 1997, Applicant pleaded guilty to two counts of Petit Theft. He was fined \$533.60, placed on probation for one year, and sentenced to serve 120 days in jail, with 90 days suspended. Applicant admits allegation 1.b., which is describes in the SOR as a felony, apparently because the arrest is cited in the FBI Criminal History (GX 2) as "F Burg." I understand that term to mean Felony Burglary. However, copies of the original court documents refer to the violation as a misdemeanor (AX A, AX C, and AX D (the booking/arrest form)). There is no reference to "felony" status on any of the police/court documents. Under these unique circumstances, particularly since Applicant does not appear to have any legal background, his admission of an allegation that includes the term "felony" is not conclusive or binding. The overall evidence indicates the offense was always treated as a misdemeanor.

1.c. - The falsification-related information cited in subparagraphs 2.a and 2.b., below, does not establish any intent to deceive the Government. For the reasons stated below, this allegation is found in favor of Applicant.

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

2.a. - Applicant is alleged to have falsified material facts on his May 24, 2004 security clearance application (SF 86), when he answered Question **21 Your Police Record - Felony Convictions**, by saying "No," and failing to cite the 1997 felony arrest cited in 1.b., above. However, the Government has not shown that Applicant was arrested for a felony offense, as is alleged in 1.b.

In fact, the offense was always treated as a misdemeanor, beginning with the arrest/booking report. Therefore, he could not have lied by denying being charged with or convicted of a felony, because that did not happen.

2.b. - Applicant is alleged to have falsified material facts on his May 24, 2004 security clearance application (SF 86), when he answered Question **24 Your Police Record - Alcohol/Drug Convictions**, by saying "No," and failing to cite the 2003 citation cited in 1.a., above. However, the Government has not established that this offense was alcohol-related . Therefore, he could not have lied by denying being charged with or convicted of an alcohol or drug related offense, because that did not happen.

2.c. - In an interview with a Special Agent of the Office of Personnel Management, on January 18, 2005, Applicant stated that "he had never been arrested for a felony, had never gone to court, and had never been in jail, whereas Applicant, although not related to a felony, had gone to court, and served time in jail, as indicated in subparagraph 1.b., above." The evidence shows that Applicant was present in court on July 15, 1997, and was sentenced to serve 120 days in jail, with 90 days suspended (AX C).

The vice president of Applicant's employer speaks highly of him and views him as a "truthful person who would not intentionally make any misstatements on his security [clearance] application" (AX K).

**POLICIES**

In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors: (1) The nature, extent, and seriousness of the conduct; (2) The circumstances surrounding the conduct, to include knowledgeable 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.

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 J (Criminal Conduct)***

1.a. The allegation, as amended at the hearing, is that Applicant was cited for violating a Glass Bottle [on the beach] ordinance in March 2003. Applicant admitted the incident, which resulted in a citation, and led to a \$40.00 fine. There is no suggestion in the record that the bottle contained alcohol and I note there is no allegation in the SOR under Guideline G (Alcohol). The ordinance was apparently aimed at protecting people on the beach from the danger of broken glass in the sand. It appears that the investigator originally thought Applicant was speaking about an open container of alcohol, but Applicant insists that this was not the case, and nothing in the evidence contradicts him. At the hearing the investigator admitted the error and the allegation was amended to reflect that fact and the reference to an "Open Container of Alcohol" was deleted. Nothing in the Government's documentation describes the violation as a felony or misdemeanor; it was a violation of a city ordinance. While the allegation as amended is found to be true, I find no current security clearance significance.

1.b. Question 21 on the SF 86 asks: "Have you ever been *charged with* or *convicted* of any felony offense?" The question does not ask if Applicant had ever been *arrested* for a felony offense. (Compare with Question **26 Your Police Record - Other Offenses**, which asks "if you have been arrested for, charged with or convicted of any offense(s) not listed [in other questions].")

The FBI Criminal History (GX 2) describes the offense as "F - Burg," which appears to mean Felony Burglary. FBI records are generally very accurate, but not always. They receive and enter information from law enforcement agencies throughout the country, and that information is not always accurate or complete. That appears to be the case here, since the available court records clearly show the offense being charged, and sentence imposed, as a misdemeanor. Most important on this point is the 'Booking/Arrest Report, which states the Arrest Charge as being "Petit Theft" - M [isdemeanor]" (AX D; *see also* AX C).

I have considered the testimony of the OPM investigator who interviewed Applicant. He indicated a belief that the SF 86 did ask about Applicant "being arrested for a felony" (Tr at 39, 40), but when shown the SF 86, realized the question asked was actually: "Have you ever been charged with or convicted of a felony" (Id.). The investigator also mentioned that the "have you ever" time frame applied to "felony arrests" and that Applicant had answered that "he had never been arrested for a felony" (Tr at 32, at line 7-15). Clearly, he had not been so arrested.

Whether Applicant understood the difference in terminology is not absolutely clear, but the same question applies to the OPM investigator. Since the Government has not shown that Applicant was "charged with" and/or convicted of a felony, there is no valid basis for concluding that he had acted improperly in answering the question as he did. The OPM investigator testified that he asked Applicant if he had ever been arrested for a felony, and that Applicant has responded "Yes," but that it had been reduced to a misdemeanor (Tr at 34). He also testified that Applicant admitted he had falsified his answers on the SF 86 and during the first interview, and that he "really didn't think that you would be able to find out, that it would come up on a record check." (Tr at 35). The investigator added that Applicant stated he knew he had been charged with a felony, but that it had been reduced to a misdemeanor, [so that] he did not have to disclose that information or list it on the security questionnaire (Tr at 36). This testimony is denied by Applicant, and the original court/police records indicate that Applicant had not been charged with a felony. The investigator had not seen the State B court/police files during the investigation.

The record does not contain a written report of the interview, and the investigator, at some point prior to the hearing, had shredded his notes of the interview. He testified, apparently, from memory (Tr at 38). Applicant appears to have been unsophisticated legally, and I conclude that he was focusing on felony-related information and was not thinking separately about appearing in court and serving jail time in a non-felony situation.

Applicant's wife testified that she was present at the 2003 incident, having just come out of a restroom. She saw her husband holding a bottle of beer and speaking with a police officer. The violation that was being discussed was the possession of the glass bottle, and had nothing to do with its contents, since beer was not prohibited on the beach (Tr at 50). Applicant has worked for his present employer since June 1998. His Senior Program Manager, with 37 years experience, rates Applicant as "number one, absolutely," among the project engineers with whom he has worked (Tr at 57, 58). He does not think that Applicant "would intentionally mislead or lie to an investigator in his security clearance" (Tr at 60).

Applicant served four years in the U.S. Air Force and held a security clearance (Tr at 63).

As to the 1997 matter, Applicant knew only that he was charged with a misdemeanor. Neither his lawyer nor anyone else ever mentioned the word "felony" and he never "understood that [he] had been charged by the prosecutor with a felony" (Tr at 76, 77). I conclude that he did not intentionally omit any material information. In summary, I conclude that the lack of an admitted or otherwise proven felony charge and/or conviction makes points 2 and 3 not material, and therefore not a basis for an adverse determination.

On cross examination, the OPM investigator stated that a recheck of police records showed that the offense was actually "dumping rubbish on a beach," and there was no mention of alcohol

(Tr at 43). As to the burglary allegation, the investigator admitted that he had not looked at the State A court files, including the charging documents, none of which mentioned the word "Felony" (Tr at 45, 46). His only source for the allegation of a felony arrest was that Applicant told him it was for two counts of felony Burglary (Tr at 44). Yet, Applicant denies this allegation and it is contradicted by other evidence.

1.c. The validity of this alleged criminal violation depends on whether Applicant intentionally falsified material facts on his May 2004 SF 86 about the 1997 and 2003 incidents alleged under 1.a. and 1.b., above. As discussed below, the Government has not shown that Applicant deliberately falsified any material facts in his SF 86 or in his sworn statement to the DSS agent.

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

Disqualifying Condition: E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

The 2003 citation has not been shown to be a criminal offense and the 1997 arrest, conviction, and sentencing was for a misdemeanor. Neither episode qualifies as a "serious crime" under DOHA precedent and the 1997 matter is this a single "lesser offense."

Mitigating Conditions: E2.A10.1.3.1. The criminal behavior was not recent (misdemeanor burglary in 1997; the glass bottle on beach ordinance was a criminal violation in 2003. In any case, it was almost three and half years ago, and is deemed not recent; E2.A10.1.3.2. Considering the nature and timing of the two matters, I deem them to be an isolated matter, particularly since the 2003 violation has not been shown to be a criminal violation and the misdemeanor violation was nine years ago; E2.A10.1.3.6. There is clear evidence of successful rehabilitation, as evidenced by Applicant's life and accomplishments over the last nine years, as shown by the overall record.

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

2.a. The flaw in the Government's position is that it has not proved under 1.b. that a felony was committed in 1997 and that Applicant had been charged with or with convicted of a felony. No mitigation is required, since Applicant did not lie about a material matter. Assuming that Applicant's failure to report the court appearance and his incarceration in 1997 can/should be considered separately from the felony," it does not appear to be material under any other question in the SF 86 and would therefore not be security significant under the SOR in this case.

2.b. The Government has failed to show the 2003 offense alleged in 1.a. was alcohol-related. Consequently, no mitigation is required, since Applicant did not lie about a material matter.

2.c. The remaining issue is whether the Applicant lied about material facts to the OPM investigator on January 18, 2005 interview. The allegation cites three points relating, to 1.b., above:

- (1). that Applicant was arrested for a felony;
- (2) that Applicant had gone to court;
- (3) that Applicant had served time in jail.

Applicant answered "No" on all three points. As to point (1), I find Applicant's explanations to be credible and consistent with other evidence. Applicant was not arrested for a felony. Points (2). and (3) are literally true if considered separately, since Applicant did go to court and did serve some time in jail.

It can be argued that Applicant's "no" answers were intended to persuade the investigator not to go into any more detail or ask more questions or to check criminal records, even though he did tell the investigator about the 2003 citation. Applicant has not shown any legal sophistication and has been cooperative.

In addition, his consistent testimony has been that he believed the investigator was asking a three part question about a felony arrest and its consequences, and he answered "No" to all three parts because there had not been any felony arrest.

*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 that have been established by the record. *Assuming, arguendo*, that Applicant should have answered "Yes" to Points (2) and (3), they constitute an isolated incident that occurred some three years ago.

Applicant's other two witnesses, who have a total of 75 years experience with classified information between them have highly positive opinion of Applicant and have great deal of confidence in his ability to protect our nation's secrets (Tr at 55-87, and 113).

Based on the entire record, I conclude that (1) the Government has not substantiated some of the allegations, and (2) Applicant has mitigated the remainder. I further conclude that Applicant has been a valued and highly productive employee for many years, and has demonstrated that he possesses the judgment, reliability, and trustworthiness required of someone seeking 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 J (Criminal Conduct) For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Guideline E (Personal Conduct) For the Applicant

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. 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**