

DATE: August 8, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-02976

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn Antigone Trowbridge, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Admitted falsification of a security clearance questionnaire by minimizing the frequency of marijuana use between 5 and 10 years ago was mitigated by the Applicant's prompt, good-faith effort to correct the falsification before being confronted with the facts during an initial Defense Security Service (DSS) interview two months after the questionnaire was signed; violation of 18 U.S.C. 1001 was isolated. Clearance is granted.

**STATEMENT OF THE CASE**

On January 24, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated March 12, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on May 17, 2001, and a notice of hearing was issued on June 4, 2001. The undersigned held a hearing on July 10, 2001. The Department Counsel presented two exhibits ("exhs") and no witnesses. The Applicant's case consisted of the presentation of one exhibit and only his testimony. The record in this case closed on July 10, 2001. The undersigned Administrative Judge received the transcript ("tr") of the hearing on August 1, 2001.

**FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on the following two guidelines: paragraph 1, Guideline E (personal conduct), and paragraph 2, Guideline J (criminal conduct). The undersigned Administrative Judge

completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 24-year-old network administrator employed by a U.S. Government subcontractor since November 1999. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant had a troubled youth. He was rebellious, disobeyed his parents, skipped school a lot, had bad grades, and ran away from home several times. SOR answer. He was arrested in 1994 a few days before he turned 17 because he had run away from home. Tr pages 31-32. Though he used marijuana during 1991-96 at ages 14-19, he was never arrested on illegal drug charges. Tr page 32. He used marijuana during that roughly five-year period on average once a week. Exh. 2; tr pages 32-33. He purchased marijuana for his personal use between ¼ oz. to a full ounce at a time. He would sometimes buy marijuana for a friend who did not have direct access to it, and only charge the friend the cost that the Applicant had incurred. He never sold marijuana for a profit or to reduce the cost of marijuana for his own use. Tr pages 30-31. In a signed sworn statement given to a Defense Security Service (DSS) agent in April 2000, the Applicant stated:

Occasionally I would sell a little [marijuana] to get some of my money back.

Exh. 2. In his SOR answer in March 2001 he stated:

I would like to clarify and be more specific about my answer. I did indeed sell marijuana, but never for a profit or a reduced rate. The only people that I sold marijuana to were my close friends that had run out of their own personal supply. I charged them the exact amount that I paid so I would not lose any money.

SOR answer. *See also* tr pages 37-39, 47-48. Sometime during the 1991-96 period the Applicant attended for over a year a Christian school that gave him compassion, understanding, and encouragement that he had longed for. While at that school, the Applicant abstained from marijuana. However, after he left that school, he resumed smoking marijuana for another year or so until he "got fed up" with that lifestyle, recalling his prior experience at the Christian school. He had started to date a woman that he later married.<sup>(1)</sup> He also knew that if he did not "stop living the way [he] was living, that there was no way that any relationship was going to work out with [him]." Tr pages 33-34.

The day before the Applicant graduated from high school in May 1996, he quit all use of marijuana and has been abstinent ever since. He no longer associates with his drug-using friends from high school. He told them shortly after graduation, that he had renounced his current lifestyle, including the use of marijuana. He had the day before graduation "accepted Jesus as his savior." Tr pages 30, 35-36.

The Applicant has succeeded in his job for a temp agency detailed to a major defense contractor and has the support of his supervisor at the latter firm and his co-workers who know the concerns expressed in the SOR. Tr pages 24-27, 42-43, 48-49. In February 2000 the Applicant filled out a Questionnaire for National Security Positions (SF-86) seeking a Secret clearance. Being fearful that his employer might think less of him if he reported on the SF-86 that he had smoked marijuana on a weekly basis on average during 1991-96, he reported in answer to question #27<sup>(2)</sup> that he had smoked marijuana only once in May 1996. The answer was false, and he soon realized that hiding his past was not the way to conquer it. He knew he could make it right with the investigator. He voluntarily gave the investigator at the April 2000 interview correct information in order to undo his wrong. SOR answer. The investigator routinely went over the Applicant's SF-86 during the interview and asked him to verify each of his written SF-86 answers. The investigator did not know at the time how extensive the latter's use of marijuana was. When the investigator got to question #27, the Applicant was asked, "Did you only use marijuana one time?" The Applicant responded to the investigator in the negative and told him the whole truth. Tr pages 32-33, 36-41.

## POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be

considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### **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.**

**Conditions that could raise a security concern and may be disqualifying also include:**

[2nd] 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 clearance eligibility or trustworthiness, or award fiduciary responsibilities;

**Conditions that could mitigate security concerns include:**

[3rd] The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

### **GUIDELINE J - CRIMINAL CONDUCT**

**A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

**Conditions that could raise a security concern and may be disqualifying include:**

[1st] . . . criminal conduct, regardless of whether the person was formally charged;

[2nd] A single serious crime or multiple lesser offenses.

**Conditions that could mitigate security concerns include:**

[2nd] the crime was an isolated incident;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. [\(3\)](#)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. [\(4\)](#)

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Guideline E.

The Applicant admits that he deliberately lied on and falsified his Questionnaire for National Security Positions (SF-86) in February 2000 as regards the extent of his marijuana use. This falls within the scope of DC #2, which is identified on page 4 *supra*. He did not lie when he answered "no" to the question whether he had since February 1993 ever purchased

or sold illegal drugs for his own intended profit or that of another. In mitigation, the Applicant made a prompt, good-faith effort to correct the falsification before being confronted with the facts two months later at the initial DSS interview. He has told his employer and co-workers the truth subsequently. This falls within the scope of MC #3, which is also identified on page 4 *supra*. His admitted "temporary lapse of judgment" was corrected at the first opportunity. Therefore, SOR ¶ 1 (personal conduct) is concluded favorably to the Applicant.

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Guideline J.

With regard to Guideline J, SOR ¶ 2 charges that the Applicant's falsification constitutes criminal conduct (18 U.S.C. §1001). Conduct violative of that Act of Congress is a Federal felony.<sup>(5)</sup>

The undersigned concludes that the Applicant did knowingly and willfully falsify, conceal, or cover up his 1991-96 illegal drug history on his SF-86, which falls within the scope of DC #1 and DC #2 under criminal conduct identified on page 4-5 *supra*. The single act of falsification occurred rather recently: some 1½ years ago. This criminal behavior, however, was isolated (MC #2). *See* tr pages 40-41. The Applicant appears to be a sincere young man, who admits to a temporary lapse of judgment. Therefore SOR ¶ 2 (criminal conduct) is also concluded favorably to the Applicant.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on page 5 *supra*. The nature of the Applicant's falsification is much more serious than his use of marijuana five years ago. His age weighs against him because persons in their 20's should be expected to know the gravity of telling the truth in important contexts, even when the truth is potentially disadvantageous to them. The isolated nature of the falsification weighs in the Applicant's favor as does the absence of vulnerability for pressure, coercion, exploitation, or duress. A recurrence of falsification is highly improbable.

### **FORMAL FINDINGS**

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

### **DECISION**

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

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Jerome H. Silber

Administrative Judge

1. The Applicant married in September 1997 when he was 20 years old and was divorced three years later in October 2000. Tr pages 34-35, 45-46; exh. 1.

2. The question asked whether the Applicant had used marijuana since March 1993.

3. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

4. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

5. *Compare* exh. 8. The cited provision now provides:

(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 five years, or both.

Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3559(a); with regard to the maximum fine authorized, *see* 18 U.S.C. §3571.