

DATE: August 25, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-03767

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Juan J. Rivera, Esquire, Department Counsel

#### **FOR APPLICANT**

Tobe M. Lev, Esquire

### **SYNOPSIS**

Fifty-one-year-old Applicant's lengthy period of marijuana abuse while he held a security clearance; his positive random urinalysis for marijuana in March 1998; his false responses on his Security Clearance Application in July 1998; and his many admissions, denials, and contradictions during interviews conducted in September 1998, October 1998, and December 1998, as well as during the hearing in May 2003, continue to raise grave questions and doubts as to Applicant's security eligibility and suitability, and Applicant has failed to mitigate those doubts. Clearance is denied.

### **STATEMENT OF THE CASE**

On January 17, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 a clearance should be granted, continued, denied, or revoked.

In two sworn, written statements, dated February 12, 2003, and March 6, 2003, respectively, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to another Administrative Judge on April 7, 2003, but, due to caseload considerations, was reassigned to me on May 8, 2003. A notice of hearing was issued on May 8, 2003, and the hearing was held on May 27, 2003. During the course of the hearing, nine Government exhibits, three Applicant exhibits, and the testimony of two Applicant witnesses (including the Applicant), were received. The transcript (Tr.) was received on June 4, 2003.

### **RULINGS ON PROCEDURE**

During the hearing, Department Counsel moved to amend subparagraphs 2.a. and 2.b. of the SOR by deleting the date

"July 2, 1998" and substituting therefore the date "July 21, 1998." There being no objection interposed by Applicant, I granted the motion. <sup>(1)</sup>

### **FINDINGS OF FACT**

Applicant has admitted both of the factual allegations pertaining to drugs under Guideline H (subparagraphs 1.a. and 1.b.). Those admissions are incorporated herein as findings of fact. He denied the factual allegations pertaining to personal conduct under Guideline E (subparagraphs 2.a. through 2.d.) and criminal conduct under Guideline J (subparagraph 3.a.).

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 51-year-old employee of a defense contractor seeking to retain a secret security clearance, which he first received in October 1979.

Applicant illegally abused marijuana for 28 years. He commenced smoking marijuana joints in about 1970, while in high school, and continued doing so, with varying frequency, ranging from an average of one or two times per week <sup>(2)</sup> to one to two times per month--occasionally interrupted by abstinence of up to a month at a time--until at least 1998. <sup>(3)</sup>

His marijuana abuse generally escaped detection by the authorities or his employers, except for three separate incidents. At some point prior to December 2, 1973, while he was on active duty with the U.S. Air Force, the odor of burning marijuana was detected coming from his room. A search of the room, conducted by military police authorities, uncovered marijuana cigarettes and samples of marijuana throughout the room, as well as marijuana residue in two of Applicant's jackets. <sup>(4)</sup> Despite the evidence found in his room, Applicant denied having smoked marijuana that particular night. He did, however, acknowledge smoking marijuana both before and after he entered active duty. <sup>(5)</sup> He subsequently admitted to smoking marijuana on the average of one or two times per week while in the Air Force. <sup>(6)</sup> Fortunately for Applicant, the search was ruled illegal and no action was taken against him. <sup>(7)</sup>

In June 1984, military police authorities detected a strong odor of burning marijuana in the base fuels section of the facility where Applicant worked as a civilian employee. Applicant and two other employees were involved, and when one of the participants admitted his participation in the incident and named the two other participants, Applicant and the other participant were disciplined. <sup>(8)</sup> Applicant was demoted and given 30 days disciplinary suspension from his job. <sup>(9)</sup> Fortunately for Applicant, the police were unable to obtain any physical evidence of his smoking marijuana, because if they had, he would have been terminated. <sup>(10)</sup> Applicant attributed his involvement that date to concern about his mother's hospitalization, and he used the marijuana to calm himself down. <sup>(11)</sup>

In March 1998, Applicant was randomly selected for urinalysis drug testing at work. The sample tested positive for marijuana. <sup>(12)</sup> He subsequently acknowledged he had passed around and smoked a few hits of a marijuana joint while celebrating at his birthday party a few days earlier. <sup>(13)</sup>

In addition to being a marijuana user, Applicant also was a marijuana purchaser. By his own admission, he purchased marijuana in quantities of one or two joints at a time. <sup>(14)</sup>

Applicant is also a liar. On July 21, 1998, Applicant completed his Security Clearance Application (SF 86). <sup>(15)</sup> In response to an inquiry pertaining to ever ("since the age of 16 or in the last 7 years, whichever is shorter") having used a variety of illegal substances, including marijuana, <sup>(16)</sup> Applicant acknowledged using marijuana during a three-day period in March 1998, but failed to disclose the full extent of his drug abuse. In addition, in response to an inquiry pertaining to ever having used a controlled substance while possessing a security clearance, <sup>(17)</sup> Applicant denied having done so despite the fact he held a security clearance beginning in October 1979. By signing the SF 86, he certified that his responses were true, complete, and accurate. They were false. He had lied, falsified, omitted, and concealed true

history of his substance abuse, as described above.

Nearly two months later, in early September 1998, Applicant was interviewed by a Defense Security Service (DSS) investigator, and he made the following statements:

- he experimented with marijuana only a few times while in high school in 1970; [\(18\)](#)

One month later, in early October 1998, Applicant was again interviewed by the same DSS investigator, and made the following statements:

- he experimented with marijuana only a few times while in high school in 1970, and since that time, had used marijuana with varying frequency, on an average of one or two times per month--occasionally interrupted by abstinence of up to a month at a time--until about 1998; [\(22\)](#)

In early December 1998, Applicant underwent a polygraph examination administered by DSS to resolve derogatory information developed during the background investigation. During the pretest interview, he continued to deny any additional illegal drug involvement, including the purchase of marijuana. [\(27\)](#) During the post-test interview, he acknowledged previously lying about the extent of his substance abuse. [\(28\)](#) Applicant admitted purchasing marijuana in small amounts for personal use, paying one or two dollars on a monthly basis. [\(29\)](#) No opinion as to Applicant's truthfulness during the in-test phase of the polygraph examination could be rendered due to the "inconclusive nature of the polygrams." [\(30\)](#)

Finally, during the hearing conducted in May 2003, Applicant provided yet another explanation of his drug involvement when he made the following statements:

- he was scared about losing his security clearance and being criminally prosecuted if he told investigators the truth about his substance abuse in 1998; [\(31\)](#)  
was found in his pockets; [\(32\)](#)

Between May 1998 and July 1998, Applicant attended a six-week group drug awareness and counseling class, as part of his condition to return to work. [\(40\)](#) When entered into the program, Applicant was diagnosed with the condition of Cannabis Abuse, Not Dependent. [\(41\)](#)

Applicant has been employed as a fuel truck driver by a Government contractor for the past three years. His supervisor characterized Applicant's job performance in very favorable terms.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

The entire adjudicative process requires a conscientious scrutiny of a number of variables known as the "whole person concept." All available, reliable information about the person, past and present,

favorable and unfavorable, should be considered in making a meaningful decision. The adjudicative process factors which an Administrative Judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Drug Involvement - Guideline H: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.**

**Personal Conduct - Guideline E: 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.**

**Criminal Conduct - Guideline J: 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, as well as those which could mitigate security concerns, pertaining to each of the adjudicative guidelines are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the "clearly consistent with the interests of national security" standard<sup>(42)</sup> or "clearly consistent with the national interest" standard. For the purposes herein, despite the different language, I have concluded both standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, a heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. Because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions are predictive in nature and must often address potential, rather than actual, risk of compromise of classified information.

Finally, Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7

of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

### CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the purchase, possession, and use of marijuana, is of concern, especially in light of his request for continued access to classified information. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) E2.A8.1.2.1. (*any drug abuse*), and DC E2.A8.1.2.2. (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*). Moreover, I believe Applicant's diagnosis of Cannabis Abuse, Not Dependent, received when he entered the group drug awareness and counseling class in May 1998, falls within DC E2.A8.1.2.3. (*diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence*).

Applicant did not simply experiment, while a teenager, out of curiosity, and stop. Instead, motivated by a variety of reasons, including angst over his mother's health, and social pleasures, notwithstanding the legal status of his endeavor, he exhibited a pattern of questionable judgment, irresponsibility, and immature behavior, and continued his substance abuse of marijuana, on an irregular, but sustained, basis for at least 28 years. Applicant placed his drug-induced social pleasures above his fiduciary responsibilities as a holder of a security clearance and ignored the criminal nature of his conduct. Such illegal substance abuse, while holding a security clearance, clearly falls within DC E2.A8.1.2.5. (*failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination*). As stated above, improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information.

Also of import is Applicant's inconsistent renditions of his history of substance abuse. He admitted, under oath or affirmation or certification, and subsequently denied, also under oath or affirmation or certification, substance abuse pertaining to specific incidents or periods. Applicant's constantly changing versions of "the truth" lead me to discount many of them as unreliable.

Likewise, despite the investigations into his relationship with marijuana in 1973 and 1984, and the disciplinary action taken against him as a result of the 1984 incident, in March 1998, Applicant again returned to substance abuse, and again, lied about such abuse until he was confronted with a polygraph examination. And, he subsequently recanted his earlier admissions.

The presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process. Applicant completed a six-week group drug awareness and counseling class, as a condition of his return to work, and to get a better self-understanding of the behavioral and psychological effects of his actions. However, by consistently minimizing the extent of his substance abuse, Applicant does not demonstrate true acceptance of his actions or insight into the actual motivation for the course of conduct he chose. I do not consider Applicant's group drug awareness and counseling class to constitute the type of drug treatment program envisioned in Drug

Involvement Mitigating Condition (MC) E2.A8.1.3.4. (*satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional*). Furthermore, while Applicant's purported period of abstinence may have commenced in March 1998, and continued thereafter to the close of the record, his inability or refusal to accept and acknowledge his earlier substance abuse undermines his claims he will not use illegal drugs in the future.

Applicant has rejected future illegal substance abuse. That simple pledge, initially made in 1998, and repeated in May 2003, overturned years of illegal substance abuse, part of which occurred while he held a security clearance. However, this position does not, in my estimation, constitute a "demonstrated intent not to abuse any drugs in the future," as set forth in MC E2.A8.1.3.3. (*a demonstrated intent not to abuse any drugs in the future*).

Under the evidence presented, and with doubts regarding Applicant's credibility, I possess little confidence that Applicant's substance abuse will not recur. Even with new good intentions and a period of purported abstinence, a greater period of confirmed abstinence seems necessary to generate such confidence. Thus, I believe Applicant has failed to mitigate or overcome the Government's case. The evidence leaves me with grave questions and doubts as to Applicant's continued security eligibility and suitability. Accordingly, I conclude allegations 1.a. and 1.b. of the SOR against Applicant.

With respect to Guideline E, the Government has established its case. Examination of Applicant's actions reveals a pattern of conduct involving questionable judgment, untrustworthiness, and unreliability. He falsified responses on his SF 86 in July 1998, and lied to DSS investigators during interviews conducted in September 1998, October 1998, and December 1998. He denied certain aspects of substance abuse, admitted other aspects, recanted his earlier admissions, and eventually contradicted previous admissions and denials. And he continued those contradictions during the hearing in May 2003. Even when confronted with a polygraph examination, Applicant continued to make false statements. In this instance, I have no evidence of unintentional or careless oversight; rather, his statements were calculated and deliberate omissions and falsifications of information.

Applicant's overall questionable personal conduct in this regard clearly falls within Personal Conduct 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 clearance eligibility or trustworthiness, or award fiduciary responsibilities*); 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 known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*); and DC E2.A5.1.2.5. (*a pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*). None of the Mitigating Conditions apply because of his continuing falsifications.

Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate, meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions and activities therefore poses a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system. Moreover, possession of a security clearance entails considerable responsibilities in terms of protecting the national security and in maintaining appropriate personal conduct. With those responsibilities comes accountability. In this instance, while Applicant may be highly regarded by his current employer, he is also now accountable for those past actions and activities. Accordingly, I conclude allegations 2.a. through 2.d. of the SOR against Applicant.

With respect to Guideline J, the Government has established its case. Statements made by an applicant for access to classified information encompass matters within the jurisdiction of the Department of Defense, and are provided under Title 18, United States Code, Section 1001. Applicant's actions are filled with admissions, denials, and contradictions. His eventual explanations for failing to accurately relate his correct history of substance abuse simply do not excuse such actions. I conclude, therefore, Applicant's felonious conduct--misrepresentation, falsification, omission, and concealment of his substance abuse history, was material and made in a knowing and willful manner in contravention of Title 18, United States Code, Section 1001. That criminal conduct clearly falls within Criminal Conduct DC E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*). None of the Mitigating Conditions apply.

While a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability such conduct will not recur in the future. Without more, I simply do not believe the period of time from the most recent falsification--during the hearing in May 2003--is sufficient to persuade me recurrence of such criminal conduct is unlikely. Consequently, I conclude Applicant has failed to mitigate or overcome the Government's case. Accordingly, I conclude allegation 3.a. of the SOR against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Paragraph 3. Guideline J: AGAINST THE APPLICANT

Subparagraph 3.a.: Against 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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Robert Robinson Gales

Chief Administrative Judge

1. Tr. at 33-35.
2. Government Exhibit 3 (Department of the Air Force letter, dated June 14, 1982).
3. Government Exhibit 8 (Statement of Subject, dated October 6, 1998), at 1.
4. Government Exhibit 3, *supra* note 2.
5. *Id.*
6. *Id.*
7. *Id.*
8. Government Exhibit 5 (Employer Adverse Information Report, dated June 18, 1984).
9. *Id.*
10. *Id.*
11. Government Exhibit 4 (Statement of Subject, dated September 18, 1984).
12. Government Exhibit 6 (Employer Adverse Information Report, dated March 25, 1998).
13. Government Exhibit 8, *supra* note 3, at 2.
14. Government Exhibit 9 (Statement of Subject, dated December 1, 1998), at 1.
15. Government Exhibit 1 (Security Clearance Application (SF 86), dated July 21, 1998).
16. Question 27.
17. Question 28.
18. Government Exhibit 7 (Statement of Subject, dated September 1, 1998), at 3.
19. *Id.*
20. *Id.*
21. *Id.*, at 2.
22. Government Exhibit 8, *supra* note 3, at 1.
23. *Id.*, at 2.
24. *Id.*
25. *Id.*
26. *Id.*, at 1.
27. Applicant Exhibit C (DSS Polygraph Report of Examination, dated December 7, 1998), at 1.
28. *Id.*, at 2.



29. *Id.*

30. *Id.*

31. Tr. at 18-19, 25,39.

32. *Id.*, at 20.

33. *Id.*

34. *Id.*, at 20-22.

35. *Id.*, at 30.

36. *Id.*, at 24.

37. *Id.*, at 25.

38. *Id.*, at 32.

39. *Id.*, at 36.

40. Applicant Exhibit A (Last Chance/Return to Work Agreement, dated May 21, 1998); Applicant Exhibit B (Education and Support for Recovery Program extract, dated July 1, 1998), at 2.

41. Applicant Exhibit C, *supra* note 27, at 4.

42. *See* Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (*see*, Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)