

DATE: July 31, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-04704

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

D. Michael Lyles, Esq., Department Counsel

Francisco Mendez, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant falsified material facts about his drug use and purchase of illegal drugs on two security clearance applications and in interviews with authorized investigators of the Defense Security Service. He also provided false information on a security clearance application about his employment record and his use of illegal drugs while employed as a federal law enforcement officer and while holding a security clearance. Additionally, Applicant admitted security violations while employed as a federal law enforcement officer. Applicant's deliberate falsifications demonstrated a pattern of criminal activity. He failed to mitigate security concerns arising from his conduct under Guidelines E, K, and J of the Directive. 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. On September 16, 2005, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct), Guideline K (Security Violations), and Guideline J (Criminal Conduct) of the Directive. On October 7, 2005, Applicant submitted an answer to the SOR and elected to have a hearing before an administrative judge. The case was assigned to me March 20, 2006. On April 26, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses and introduced five exhibits (Ex.), which were admitted to the record without objection. Applicant called no witnesses and offered no exhibits. On May 10, 2006, DOHA received the transcript (Tr.) of the proceeding.

### **FINDINGS OF FACT**

The SOR in this case contains 29 allegations of disqualifying conduct under Guideline E, two allegations under

Guideline K, and one allegation under Guideline J, Criminal Conduct. In a signed, sworn statement to an authorized investigator in January 2004, Applicant admitted the Guideline E and K disqualifying conduct alleged in the SOR. In his October 7, 2005, answer to the SOR, Applicant admitted five allegations under Guideline E and denied 22 Guideline E allegations. He admitted in part and denied in part two Guideline E allegations. He admitted one Guideline K allegation and denied the other Guideline K allegation. He neither admitted nor denied the Guideline J allegation, asserting he was not an attorney and unable to render a legal opinion. Applicant provided no credible explanation for admitting the Guideline E and K allegations in January 2004 and then denying Guideline E and K allegations in his October 7, 2005 answer to the SOR. Applicant's admissions are incorporated as findings of fact.

Applicant is 57 years old and employed as a translator by a government contractor. His first marriage ended in divorce in 1992. He married his present wife in 1992. He is the father of four adult children who were born during his first marriage. (Ex. 1; Tr. 43.)

Applicant served in the U.S. Army from 1967 to 1970 and from 1973 to 1975. (Ex. 1.) From 1968 to approximately 1988, Applicant used and purchased marijuana. His most frequent use of marijuana during this time was two to three times a week. He used marijuana once in 1991. (Ex. 2 at 2; Tr. 26-27.)

During the period 1972 to approximately 1990, Applicant used and purchased hashish, with varying frequency. He used Thai Sticks<sup>(3)</sup>, with varying frequency, in the early 1970s. Between 1971 and 1974, he used cocaine approximately four or five times, and he purchased cocaine. (Ex. 2 at 2.)

Applicant used speed<sup>(4)</sup> with varying frequency from about 1968 to about 1970, and he purchased speed. During a period of time between the late 1960s and approximately August 1970, Applicant used LSD 25 to 50 times, and he purchased LSD. Between 1968 and 1969, Applicant used opium about seven times, and he purchased opium. In the period 1972 to 1975, Applicant used heroin about 15 times, and he purchased heroin. Applicant used barbiturates illegally. In the early 1970s, he also abused snappers<sup>(5)</sup> (Ex. 2 at 2.)

Applicant was employed as a federal law enforcement officer from September 1975 to about August 1989. During this employment, he held a Top Secret security clearance and used illegal drugs, including marijuana and hashish. (Ex. 1; Ex. 2; Ex. 3 at 4.)

In approximately 1986, while employed as a federal law enforcement officer, Applicant conducted at least four unauthorized private tours of a national monument for a lobbyist and the lobbyist's friends. Without authorization, he also distributed official mementos and souvenirs to individuals he took on the private tours of the national monument and to other federal employees working at the national monument. On two occasions, while he was employed as a federal law enforcement officer, Applicant performed paid security services for a private citizen, even though he knew that such moonlighting was against the policies of his federal law enforcement agency. (Ex. 2 at 3-4.)

On at least two occasions, while assigned to a secure federal facility, Applicant removed classified material from a burn bag and read it, even though he had no need to know the classified information. He acknowledged he may have discussed the classified information with another federal law enforcement officer, who also had no need to know the classified information. (Ex. 2 at 4.)

Applicant was assigned by his employer to perform community service because he had violated his agency's policies when he gave the private tours, distributed mementos, and took classified material from a burn bag and read it. (Tr. 30-31.)

In August 1989, as a result of his unauthorized conduct and pending the disposition of possible criminal charges against him, Applicant received an indefinite suspension from his position as a federal law enforcement officer. Fearing the investigation of the allegations against him would take a long time and he would be harassed, Applicant resigned from his position sometime in late 1989. (Ex. 5; Ex. 2 at 4-5.)

Applicant completed and signed a personal security questionnaire (DD Form 398) on September 30, 1992. Question 22 a. on the DD Form 398 reads as follows "Have you ever tried or used or possessed any narcotic (to include heroin or

cocaine), depressant (to include quaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), or any mind-altering substance (to include glue or paint), even one time or on an experimental basis, except as prescribed by a licensed physician?" (Ex. 3.)

Applicant answered "yes" to Question 22 a. and appended the following explanation to his DD Form 398:

During my time in the army in [name of country omitted], I was exposed to marijuana. My outlook on drugs while living in the jungle in a combat setting was far different from my upbringing. I smoked marijuana occasionally in social situations (with neighbors) in the 1970s and early 1980s while living in [name of State omitted] and once at a party in [name of city omitted] in 1990.

I have absolutely no desire to use, possess or have contact with any drugs now or at any time in the future.

Question 22 b. on the DD Form 398 reads as follows: "Have you ever been involved in the illegal purchase, manufacture, trafficking, production, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis?" Applicant responded "no" to question 22 b. Applicant was interviewed by a special agent of the Defense Investigative Service and prepared a signed statement in the presence of the special agent on April 8, 1993. In his statement Applicant admitted smoking marijuana from 1968 to 1969, from 1970 through 1982, and once in 1990. He did not admit any other illegal drug use, and he denied ever purchasing or selling marijuana. (Ex. 4 at 1.)

On July 1, 1998, Applicant certified and signed a security clearance application (SF-86). Question 20 on the SF-86 asks an applicant if, in the last 10 years, he or she has been fired from a job, quit after being told he or she would be fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following allegations of unsatisfactory performance, or left a job for another reason under unfavorable circumstances. Applicant responded "no" to Question 20. (Ex. 1.)

Question 27 on the SF-86 reads as follows: "**Your Use of Illegal Drugs and Drug Activity-Illegal Use of Drugs** Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs? Applicant answered "yes" to Question 27 and admitted using marijuana 10 times between June 1968 and August 1990. He did not admit hashish use from about 1972 to 1990. (Ex. 1.)

Question 28 on the SF-86 reads as follows: "**Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions** Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?" Applicant answered "no" to Question 28.

In his answer to the SOR, Applicant acknowledged meeting with an authorized investigator of the Department of Defense in September 1998 and denied he deliberately failed to disclose his involvement with illegal drugs. (Answer to SOR at 2; Item 8.)

On January 29, 2004, Applicant was interviewed by a special agent of the Defense Investigative Service. Applicant admitted all of his past drug activity. He stated he had not listed or acknowledged his drug use and drug purchases previously because he felt if he were to put it all on his SF-86, his "clearance request would be immediately trashed." (Ex. 2 at 3.) At his hearing, Applicant stated that embarrassment about his drug activity caused him to falsify his answers on his DD Form 398 and SF-86. (Tr. 43.)

Item 25 on the DD Form 398 reads as follows: "CERTIFICATION BY PERSON COMPLETING FORM I certify that the entries made by me are true, complete, and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See U.S. Code, Title 18 Section 1001.)" Applicant signed and certified his DD Form 398 on September 30, 1992.

On July 1, 1998, when Applicant completed his SF-86, he signed and dated the following statement:  
**"CERTIFICATION BY PERSON COMPLETING FORM** My statements on this form, and any attachments to it,

are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code)."

## 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 has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 2, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal 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 that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. 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.

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

In the SOR, DOHA alleged Applicant raised security concerns when he falsified material facts in his answers to Questions 22.a. and 22.b. on the DD Form 398 he executed and signed on September 30, 1992 and in his answers to Questions 20, 27, and 28 on the SF-86 he signed and certified on July 1, 1998. (SOR ¶¶ 1.a., 1.b., 1.d., 1.e.(1), 1.e.(2), and 1.g.). DOHA also alleged Applicant deliberately falsified material facts in a signed sworn statement, he executed and presented to an authorized investigator on April 8, 1993 (¶ 1.c.) and that during an interview with an authorized investigator of the Defense Department in September 1998, he deliberately failed to disclose his involvement with illegal drugs (¶¶ 1.f (1) through 1.f (17)). Further, DOHA alleged that, from approximately 1986 to 1989, while employed as a federal law enforcement officer, Applicant conducted at least four unauthorized private tours of a national monument ( ¶ 1.h.); that he distributed mementos associated with the national monument, without authorization, which resulted in a criminal investigation and a requirement by his employer that he perform 40 hours of community service (¶ 1.i.); that, contrary to the policy of his employing agency, he performed private security services, for which he was compensated (¶ 1.j.); that, at least twice in about 1987, without having authorization and a need to know, he removed and read classified information from a burn bag located in the national monument (¶ 1.k.); and that he resigned from his position as a federal law enforcement officer in late 1989, following an indefinite suspension and pending the disposition of possible criminal charges against him. (¶ 1.l.).

Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly

safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in the SOR and admitted by Applicant, the Government has established its case. Applicant's failure to answer Questions 22 a and 22 b on his DD Form 398 completely, truthfully, and correctly and his failure to answer Questions 20, 27 and 28 on his SF-86 completely, truthfully, and correctly raise security concerns under Disqualifying Condition (DC) E2.A5.1.2.2. of Guideline E. His deliberate false statements and omissions in interviews with authorized investigators of the Defense Department regarding the nature and extent of his use of illegal drugs raise concerns under DC E2.A5.1.2.3.

In an interview with an authorized investigator in January 2004, Applicant admitted his past use of drugs and said he deliberately failed tell the truth about his drug-related conduct because he was ashamed and feared that if he told the truth he would not be granted a security clearance. Applicant's concealment of his drug use, his use of drugs while holding a security clearance, and his indefinite suspension from his position as a law enforcement officer are facts that could affect his personal and professional standing and could make him vulnerable to coercion and blackmail. DC E2.A5.1.2.4. His actions in conducting unauthorized tours, distributing, without authorization, mementos, violating his agency's policies by working as a private security guard, and removing and reading, without a need to know, classified information from a burn bag suggest a pattern of dishonesty or rule violation and raise additional concerns under DC E2.A5.1.2.5. His repeated false statements raise concerns about his truthfulness and honesty. Applicant's reticence, between 1992 and 2004, to reveal the truth about his conduct indicated that, under some circumstances, he would likely put his interests before those of the Government. It is well established that embarrassment is not a mitigating condition under the Directive. ISCR Case No. 99-0557 at 3 (App. Bd. Jul.10, 2000).

Mitigating condition (MC) E2.A5.1.3.1 does not apply to the facts of this case: the information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Only one other mitigating condition under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. MC E.2.A.5.1.3.2. Applicant supplied the correct information only when repeatedly questioned by authorized investigators of the Department of Defense. His falsifications were multiple and occurred recently. Accordingly, MC E.2.A.6.1.3.2. does not apply to the facts of Applicant's case. The Guideline E allegations in the SOR are concluded against the Applicant.

### **Guideline K -Security Violations**

In the SOR, DOHA alleged under Guideline K of the Directive that Applicant, on at least two occasions, while employed in 1987 as a federal law enforcement officer, removed and read, without the need to know, classified documents from a burn bag. (¶ 2.a.). DOHA also alleged that after reading the classified documents, Applicant discussed their contents with another federal law enforcement officer (¶ 2.b.). Under Guideline K, noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information. E2.A11.1.1.

Applicant's deliberate and negligent conduct raises security concerns under Disqualifying Condition (DC) E2.A11.1.2.2. of Guideline K. Applicant's conduct was infrequent, making Mitigating Condition (MC) E2.A.11.1.3.2 applicable. However, his conduct was deliberate, not the consequence of improper or inadequate training, and did not demonstrate a positive attitude towards the discharge of security responsibilities. Thus, MC E2.A11.1.3.1., E2.A.11.1.3.3., and E2.A11.1.3.4. are not applicable. The Guideline K allegations of the SOR are concluded against the Applicant.

### **Guideline J - Criminal Conduct**

In the SOR, DOHA alleged Applicant demonstrated a history or pattern of criminal activity by his deliberate and multiple material falsifications about the full extent of his use of illegal drugs, his purchase of illegal drugs, his resignation from a position after he was suspended under unfavorable circumstances, and his use of illegal drugs while employed as a federal law enforcement officer and possessing a security clearance. Applicant deliberately falsified two personnel security questionnaires which he then signed, dated, and certified. Additionally, he misled and provided false information to authorized investigators who questioned him about the truth and accuracy of his answers on the

questionnaires. In the SOR, DOHA alleged that Applicant's deliberate falsifications constituted a violation of Federal law under Section 1001 of Title 18, United States Code. (¶ 3.a.)

Applicant admitted making knowing and willful false statements in his responses to Questions 22 a and 22 b on his DD Form 398 and Questions 20, 27, and 28 on his SF-86.

Under section Title 18, Section 1001, of the United States Code, it is a felony crime to knowingly make a materially false, fictitious, or fraudulent statement to a department or agency of the Federal government. Applicant admitted preparing and signing a DD Form 398, a SF-86, and written statements to government investigators in which he deliberately concealed unfavorable information about the extent of his illegal drug use, his purchase of illegal drugs, his suspension from a position pending disposition of possible criminal charges against him; and his use of illegal drugs while employed as a federal law enforcement officer and while holding a security clearance.

Applicant's admitted criminal conduct raises security concerns under Disqualifying Conditions (DC) E2.A10.1.2.1. and DC E2.A10.1.2.2. of Guideline J. His history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. ¶ E2.A10.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy.

Applicant's falsifications of his security clearance applications and signed, sworn statements occurred in 1992, 1993, and 1998. He allowed his falsifications and omissions to stand uncorrected until January 2004, when he prepared and signed a statement admitting his willful false statements. Applicant's criminal acts were therefore recent. They were not isolated events but instead demonstrated a pattern of criminal conduct. Thus, neither MC E2.A10.1.3.1. nor MC E2.A10.1.3.2. of Guideline J applies to Applicant's Guideline J conduct. Additionally, no other mitigating conditions under Guideline J are applicable to the facts of Applicant's case. Accordingly, the Guideline J allegations in the SOR are concluded against the Applicant.

### **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

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e(1): Against Applicant

Subparagraph 1.e(2): Against Applicant

Subparagraph 1.f(1): Against Applicant

Subparagraph 1.f(2): Against Applicant

Subparagraph 1.f(3): Against Applicant

Subparagraph 1.f(4): Against Applicant

Subparagraph 1.f(5): Against Applicant

Subparagraph 1.f(6): Against Applicant

Subparagraph 1.f(7): Against Applicant

Subparagraph 1.f(8): Against Applicant

Subparagraph 1.f(9): Against Applicant

Subparagraph 1.f(10): Against Applicant

Subparagraph 1.f(11): Against Applicant

Subparagraph 1.f(12): Against Applicant

Subparagraph 1.f(13): Against Applicant

Subparagraph 1.f(14): Against Applicant

Subparagraph 1.f(15): Against Applicant

Subparagraph 1.f(16): Against Applicant

Subparagraph 1.f(17): Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Paragraph 2. Guideline K: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.

2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

3. Thai Sticks are defined as bundles of marijuana soaked in hashish oil and/or marijuana buds bound on short sections of bamboo. [Http://www.nicd.us/drugstreetandslangterms.html#T](http://www.nicd.us/drugstreetandslangterms.html#T).

4. Speed is defined as methamphetamine; amphetamine; crack. [Http://www.nicd.us/drugstreetandslangterms.html#T](http://www.nicd.us/drugstreetandslangterms.html#T).

5. Snappers are defined as isobutyl nitrite, a vasodilator used as a recreational drug. [Http://www.nicd.us/drugstreetandslangterms.html#T](http://www.nicd.us/drugstreetandslangterms.html#T).