

DATE: August 12, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-06546

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

Herbert M. Silverberg, Esquire

**SYNOPSIS**

The Applicant intentionally falsified a Security Clearance Application concerning the year in which he used illegal drugs. In addition, he failed to provide credible evidence that he had resolved two long-standing bench warrants against him. Adverse inference is not overcome. Clearance is denied.

**STATEMENT OF THE CASE**

On October 15, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on December 4, 2001, and requested a hearing. The case was received by the undersigned on February 26, 2002, and a Notice of Hearing was issued on March 11, 2002.

A hearing was held on April 23, 2002, at which the Government presented four documentary exhibits. Testimony was taken from the Applicant, who called two additional witnesses and also submitted two hearing exhibits (Applicant's Exhibits A and B), and one post-hearing exhibit (Applicant's Exhibit C). Applicant's Exhibit C is a letter from the same psychiatrist who prepared Applicant's Exhibit A, along with the psychiatrist's curriculum vitae. The transcript was received on May 1, 2002.

**FINDINGS OF FACT**

The Applicant is 26, married and has an Associate of Arts degree. He is employed by a defense contractor as a Technician, and he seeks a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process; and, that he has outstanding bench warrants which show unreliability, untrustworthiness and an unwillingness to comply with rules and regulations.

On April 7, 2000, the Applicant completed an official DoD questionnaire in which he stated that he had used marijuana twice in September 1993. (Government Exhibit 1, question 27.) This statement was a false answer to a relevant question concerning the Applicant's drug use history.

The Applicant was subsequently interviewed by a Special Agent of the Defense Security Service (DSS) in November 2000. During this interview, the Applicant admitted that he had in fact used marijuana three or four times in 1996. In a sworn statement taken at that interview the Applicant stated, "On my security questionnaire, I listed use of marijuana on two occasions in 1993. This is not correct. I did not correctly list my marijuana use on my security questionnaire because I was afraid of getting in trouble if I correctly listed my use of marijuana in 1996. So instead of listing 1996 I listed 1993, since it was closer to seven years ago." (Government Exhibit 3 at 2.) At the hearing the Applicant testified that he had put down the earlier date, even though he knew it was wrong, because it was further in the past and did not make him look as bad. (Transcript at 59-60, 76-78.)

At the hearing, the Applicant testified that the actual year he used marijuana was not 1993 or 1996, but 1995. His wife also testified and confirmed that the Applicant did not use marijuana after they met in late 1995, but he did admit to her using it before they met. (Transcript at 31-32, 36-37.) She also described his confusion about dates.

In 1995, the Applicant was convicted for the misdemeanor offense of Trespass. He was ordered to pay a fine of \$31 and perform 25 hours of community service. The Applicant failed to pay the fine or complete the community service and bench warrants were issued. (Government Exhibit 4.) In his November 2000 statement (Government Exhibit 3) the Applicant confirms that he has been informed of the warrants and will work to resolve the situations. The Applicant testified that he finally did so a year later in December 2001 and January 2002. (Transcript at 74-76.) However, the Applicant did not submit documentation to support his testimony. The record was left open for him to supply such documentation. When Applicant's counsel submitted Applicant's Exhibit C on May 16, 2002, he also filed Applicant's Unopposed Motion for Leave to File Supplemental Materials Out of Time. In that motion he states, "Because the Applicant has taken on additional weekend and evening work in order to make up for overtime pay lost because of the suspension of his clearance, he has also been delayed in furnishing evidence of resolution of outstanding warrants and satisfaction of community service requirements. We are endeavoring to provide that over the next several days if at all possible." No additional documentation has been received from the Applicant or his counsel.

### Mitigation.

The Applicant's supervisor testified on his behalf. This person described the Applicant as someone who is truthful and honest. The Applicant ranks second out of the seven people the witness supervises.

The Applicant also submitted his most recent Performance Appraisal which shows that he Exceeds Requirements for his job. (Applicant's Exhibit B.)

A psychiatrist who examined the Applicant opined, "In my opinion his giving different dates for the cannabis usage is related to confusion and anxiety versus an attempt to deceive others. He was fearful of losing his clearance by responding affirmatively to questions about drug use and conflicted about not answering honestly. This caused anxiety, which contributed to confusion about dates." (Applicant's Exhibit A at 6.)

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline E (Personal Conduct)

Conditions that could raise a security concern:

(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;

(5) a pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency.

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of falsification and refusal to resolve bench warrants that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### **CONCLUSIONS**

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has falsified an official DoD questionnaire and that he has not proved that he has resolved two bench warrants against him (Guideline E).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case against him.

The Government relies heavily upon the integrity and honesty of clearance holders, and it is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about material aspects of his or her personal background. By his own admission, the Applicant intentionally misstated the date he used marijuana so that he would not look "bad" to his new employers. While there may be some confusion as to whether the real year was 1995 or 1996, at the time the Applicant filled out the questionnaire he knew the year was not 1993. I have considered the psychiatrist's opinion concerning the Applicant's motivation, but do not agree with it.

The Applicant testified that he had resolved the two bench warrants against him. However, the Applicant completely failed to supply documentary evidence to the Administrative Judge of this fact. Given the other allegation against the Applicant, which goes directly to his credibility, his testimony on this fact is insufficient. His entire history regarding this legal situation has been one of tardiness. Based on the evidence before me, I cannot find that he has successfully resolved these warrants. His failure to do so goes directly to his good judgment and trustworthiness.

Individually, each of these allegations may arguably be insufficient to justify the denial of the Applicant's security clearance. However, they are intertwined. The Applicant's lack of candor in subparagraph 1.a. makes it impossible to accept his word that he has resolved 1.b. On the other hand, if he had presented documentation proving resolution of 1.b. it would have shown good judgment and credibility that may have overcome the falsification of 1.a.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: 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 the Applicant.

Wilford H. Ross

Administrative Judge