

DATE: April 19, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-06594

## **DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

HENRY LAZZARO, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

The Applicant attempted to sell cocaine and marijuana to supplement his income. When the Applicant completed his Questionnaire for National Security Positions he provided false answers concerning his drug arrests, drug usage, and police record. Clearance is denied.

### **STATEMENT OF THE CASE**

On December 26, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 24, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on March 7, 2002. A Notice of Hearing was issued on March 8, 2002, scheduling the hearing which was held on April 5, 2002. The Government's case consisted of three exhibits (Gov Ex). The Applicant relied on his own testimony. The record was held open to allow the Applicant to submit additional documents. No additional documents were received. A transcript (tr.) of the hearing was received on April 15, 2002.

### **FINDINGS OF FACT**

The SOR alleges acts of improper or illegal involvement with drugs (Guideline H) and falsification (Guideline E) which raise questions regarding the Applicant's willingness or ability to protect classified information. The Applicant admits the allegations, but denies he deliberately falsified or withheld information on his Std. Form 86.

The Applicant is 25 years old, has worked for a defense contractor since October 1994, and is seeking a security clearance.

In 1993, the Applicant first used marijuana, smoking it with a group during lunch break in high school. He last used it

more than two years ago. In March 1997, the Applicant was arrested for simple assault. (Gov Ex 3) He and his ex-girlfriend, the mother of his child, got into an argument which progressed into a pushing match. The police were called resulting in the Applicant's arrest for simple assault. He did not go to court over this matter. In January 1998 and arch 1998, the Applicant was arrested for possession of an open container of alcohol.

In August 1998, the Applicant was arrested for possession cocaine with intent to distribute. The Applicant was on the street trying to sell cocaine to supplement his income. (Gov Ex 2) At the time of his arrest, the Applicant possessed less than \$30.00 worth of cocaine. This was the only time he ever tried to sell cocaine and resulted in his arrest by the police. He received probation. He was ordered to submit to weekly urinalyses, which were all negative.

Five months later, in January 1999, the Applicant was arrested for possession with intent to distribute marijuana. (Gov Ex 3) The Applicant was on the street trying to sell marijuana again to supplement his income. The marijuana had been packaged into individual "baggies." Four months, later, in April 1999, the Applicant was arrested for possession of marijuana. (Gov Ex 3) The Applicant received probation for these arrests. For his three illegal drug arrests in August 1998, January 1999, and April 1999, the Applicant spent the night in jail awaiting arraignment the following morning.

In July 1999, the Superior court ordered him to pay child support. The Applicant knew he was being sued for child support but did not think this was a civil court action. (tr. 50)

In October 1999, the Applicant completed a Questionnaire for National Security Positions, Standard (Std) Form 86 (Gov Ex 1). The Applicant had a day to complete the form, which he alleges caused him to complete the form in a hasty manner. When given the form, he was told to complete it and someone from the DoD would come around to talk with him.

In Question 24, "Your Police Record - Alcohol/Drug Offenses," he was asked if he had ever been charged with, or convicted of any offense(s) related to alcohol or drugs regardless of whether the record had been sealed or otherwise stricken from the record. He answered "yes" and listed an August 1996 arrest for possession of cocaine. The Applicant's cocaine related arrest had not occurred in 1996, but occurred two years later, in August 1998--approximately 14 months before the Applicant completed the questionnaire. He failed to list his April 1999 and January 1999 arrests for possession of marijuana, his January 1998 and March 1998 arrests for possession of an open container of alcohol. When completing the form, the Applicant forgot about his alcohol related arrests.

In Question 26, "Your Police Record - Other Offenses," he was asked if during the prior seven years he had been charged with, or convicted of any offense(s) not listed in previous questions on the form. He answered "no" even though he had been arrested in March 1997 for simple assault. The Applicant alleges he misunderstood the question when asked if he had been charged or convicted of a crime. (Gov Ex 2) At the hearing, he said he forgot about the incident when completing the questionnaire.

In Question 29, "Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs," the Applicant was asked if during the prior seven years had he ever been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your own intended profit or that of another. He answered "no" even though he had used marijuana, with varying frequency, since 1993. The Applicant did not know that "cannabis" was marijuana. (tr. 54) The Applicant also answered "no" to question 27 which asked him if he had ever used marijuana.

In Question 40, "Public Record Civil Court Actions," the Applicant was asked if during the prior seven years had he been a party to any public record civil court action not listed elsewhere on the form. He answered "no" even though he had been ordered by the Superior Court to pay child support. He did not think his child support action was a civil court action. He was uncertain of the term "civil" court action.

The Applicant was willing to undergo a polygraph examination. (tr. 50)

## **POLICIES**

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied

by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

**Drug Involvement (Guideline H) The Concern:** 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.

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

- a. any drug abuse.
- b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

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

None Apply.

**Personal Conduct (Guideline E) 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

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

- 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.

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

None Apply.

### **BURDEN OF PROOF**

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment,

reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

## CONCLUSIONS

The Government established its case with regard to its security concerns over Applicant's drug involvement (Guideline H). The Applicant has a history of illegal drug use which started in 1993, when he was in high school. In less than a six-month period from August 1998 to April 1999, the Applicant was arrested three times on drug related charges. In August 1998, he tried to sell cocaine to supplement his income. In January 1999, he was trying to sell marijuana to supplement his income. These arrests had a limited impact on the Applicant for in April 1999 he was arrested for possession of marijuana. Even though he received probation for his actions, he had possessed and attempted to sell illegal drugs during his current employment. Disqualifying Condition (DC) a. [\(2\)](#) and b. [\(3\)](#) apply.

None of the mitigating conditions (MC) apply. His last arrest was less than three years ago, so it is considered recent (MC a. [\(4\)](#)). The number of arrests prevents the drug involvement from being considered isolated or aberrational (MC b. [\(5\)](#)). The record fails to disclose the Applicant's expressed intent to discontinue future use or possession (MC c. [\(6\)](#)). The Applicant has not completed a drug treatment program (MC d. [\(7\)](#)). The Applicant was selling illegal drugs to supplement his income. I find against the Applicant as to SOR subparagraphs 1.a., 1.b., and 1.c. Accordingly, Guideline H (Drug Involvement) resolved against the Applicant.

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and 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, in providing false answers on his Std. Form 86, poses a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system.

In October 1999, within six months of his last drug related arrest, the Applicant completed his Std. Form 86. Question 24, of that form asked him about his police record. He listed his cocaine related arrest but gave the date of the offense as two years earlier than when it actually occurred. It had occurred in August 1998, approximately 14 months before he completed the form. Additionally,

he failed to list his January 1999 and April 1999 arrests for possession of marijuana, which occurred approximately nine and six months before he completed the form and failed to list his two arrests for possession of an open container of alcohol that occurred in January 1998, and March 1998--within 20 months of completing the form.

When asked in Question 26 about "other offenses," the Applicant answered "no" even though approximately two and one half years earlier, in March 1997, he had been arrested and charged with simple assault following an argument and pushing match with an ex-girl friend. He answered "no" to Question 29 which asked him if he had ever purchased, trafficked, or sold cannabis, which he did not know was marijuana even though the question is entitled "Your Use of Illegal Drugs and Drug Activity." Additionally, the Applicant answered "no" to question 27 which asked him if he had ever used marijuana or cocaine. I find his explanation that he did not know cannabis was marijuana to be unpersuasive.

None of the mitigating conditions apply to these false answers. MC 1 [\(8\)](#) does not apply because the information concerning his arrests and drug usage was pertinent to a determination. MC 2 [\(9\)](#) does not apply to the falsifications because, although all the falsifications appeared on a single questionnaire, the falsifications were recent--October 1999--and the Applicant provided correct information only when questioned by DSS. Because there was no showing of a prompt, good-faith

effort to correct the falsifications before being confronted with the facts, MC 3-(10) does not apply. There is no indication the omissions were caused by improper or inadequate advice of an authorized person (MC 4-(11)) or were based on advice from legal counsel (MC 6-(12)). Nor is there evidence MC 5-(13) or MC 7-(14)

I find against the Applicant as to SOR subparagraphs 2.a., 2.b., 2.c., 2.e., 2.d., 2e., and 2.f.

In response to question 40 concerning civil court actions, the Applicant knew he had been sued for child support, but did not know this was a civil court action, which I find plausible. I find for the Applicant as to SOR subparagraph 1.g.

In reaching my conclusions I also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

This decision should not be construed as a determination that the Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance at some time in the future. Should Applicant be afforded an opportunity to reapply for a security clearance in the future he may well demonstrate persuasive evidence of his security worthiness.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline H (Drug Involvement): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Paragraph 2 Guideline E (Personal Conduct): 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

Subparagraph 2.e.: Against the Applicant

Subparagraph 2.f.: Against the Applicant

Subparagraph 2.g.: For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for the Applicant.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. DC a. any drug abuse.
3. DC b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
4. MC a. The drug involvement was not recent
5. MC b. The drug involvement was an isolated or aberrational event.
6. MC c. A demonstrated intent not to abuse any drugs in the future.
7. MC d. 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.
8. MC 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.
9. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
10. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
11. MC 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.
12. MC 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information.
13. MC 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.
14. MC 7. Association with persons involved in criminal activities has ceased.