

DATE: April 22, 2002

In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-07324

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant used crack cocaine between 1980 and 1997, at one point being addicted to it. In September 1998, when he completed his Questionnaire for National Security Positions, he provided a false answer concerning his drug usage. Clearance is denied.

**STATEMENT OF THE CASE**

On November 19, 2001, 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 December 5, 2001, the Applicant answered the SOR and requested a hearing. The case was assigned to me on January 30, 2002. A Notice of Hearing was issued on February 8, 2002, scheduling the hearing which was held on March 6, 2002. The Government's case consisted of six exhibits (Gov Ex). The Applicant relied on his own testimony and two exhibits (App Ex). A transcript (tr.) of the hearing was received on March 14, 2002.

**FINDINGS OF FACT**

The SOR alleges improper or illegal drug involvement (Guideline H), personal conduct (Guideline E), and criminal conduct (Guideline J). The Applicant admits with explanation the allegations.

The Applicant is 41 years old, has worked for a federal contractor since July/August 1997, and is seeking a security clearance. The Applicant is a hard working, dedicated employee who puts in large amounts of overtime working evenings and weekends. During the last three years he has averaged more than 800 hours of overtime. He is one of the top 25 hourly employees at his company.

The Applicant first used marijuana when he was 13 years old. From then until graduating from high school, he used it approximately ten times yearly. The Applicant stopped using marijuana when he moved to a new location and was no longer around people using marijuana. He has no intention to use marijuana in the future. (Gov 3, page 3 of 5) In the early 1980's--probably 1984, the Applicant first used crack cocaine. The Applicant became addicted to crack cocaine. He used crack cocaine approximately monthly, which caused him to stay up late, caused hyperactivity and weight loss. He was approximately 40 pounds lighter when he smoked crack then he was at the time of the hearing.

In August 1978, the Applicant was arrested (Gov Ex 5) for burglary. This occurred when he was in high school as a result of mistaken identity. The charges were dropped. In June 1980 at age 19, he was charged with violation of the Uniform Narcotic Act. He was standing on a corner sharing a beer with two friends when they were approached by the police. The police saw the Applicant toss away the two-dollar bag of marijuana he had in his pocket. After being fingerprinted, he was released to his mother's custody. The Applicant claims he was never punished for this incident. The Federal Bureau of Investigation report (Gov Ex 5) does not indicate if his arrests were charged as misdemeanors or felonies, nor does it show any disposition of the offenses listed.

In May 1987 he was charged with assault in battery. After appearing in court, the charges were dismissed. In May 1990, he was charged with theft from an automobile when he took parts from a vehicle abandoned on the highway. The car had been there a few days and had a bright orange tow sticker on it. He was taking the speakers and taillights from the car when the police arrived. The charges were dropped. (Gov Ex 3, page 3 of 5)

In the early 1990's, the Applicant was surrounded by people using drugs. In 1992, he sought help through his job to get help to eliminate illegal drug usage from his life. The Applicant started a drug treatment program which combined 17 or 18 days of inpatient treatment and Narcotics Anonymous (NA) meetings. He stayed as long as his job paid the treatment's cost. He completed four months of NA meetings attending meetings three times a week, attending 60 to 80 NA meetings. As a preventive measure, he made sure to attend NA on Fridays, which were pay days. He was living with a female who was a regular drug user. She would stop by on Friday to get money from him, and people using drugs would be at his apartment when he would return from work. His landlord tired of the people at his apartment and asked the Applicant to leave.

In April 1996, the Applicant was sitting outside a METRO station drinking beer while waiting for his bus. The METRO police cited (Gov Ex 6) him for possessing and consuming alcohol and he paid a \$100.00 fine. The Applicant never received notification of a court date and believes the case was either dismissed or dropped. (tr. 46)

The Applicant reduced his use of illegal drugs for a period of time. He was barely maintaining a job and had poor eating habits. He was living with his parents, occasionally using illegal drugs, not getting along with his sister and not paying any of his bills. One day his parents had enough and dropped him off at a homeless shelter. The Applicant had reached the "bottom of the barrel." The shelter provided one meal a day. He lived at the shelter almost a year. At the shelter he attended NA and Alcoholics Anonymous (AA) meetings. In October 1997, the Applicant used cocaine after an eleven-month abstinence. (tr. 42) This was his last use of illegal drugs. The Applicant states this was a "slip" which will not recur.

The Applicant got sick and tired of being "sick and tired" and decided to change his lifestyle. (tr. 41) In July/August 1997, the Applicant found a temporary job with his current employer and began getting his life together. He has changed his friends, his living location, he changed people, places and things. He started working. He was a temporary employee for six months before becoming a regular employee. He worked hard at his job. His goal at the shelter was to get "clean," get better, and get out of there. With his job, he was able to move out of the shelter into an apartment.

In September 1998, the Applicant completed his Std. Form 86 (Gov Ex 2). In response to question 21 concerning his felony offenses, he listed a June 1980 disorderly conduct arrest and a June 1987 burglary arrest, both of which were dismissed. The Applicant's 1980 arrest-- list by him as disorderly conduct-- was actually a violation of the uniform narcotic act. This arrest, previously described, occurred when he tossed away a two-dollar bag of marijuana. The Applicant's burglary arrested was not in June 1987 as listed on the Std. Form 86, but in August 1978. The Applicant failed to list his May 1987 assault and battery arrest and his May 1990 arrest for taking parts from an abandoned car. The Applicant did not list the last two arrests because they were dismissed. He thought there were no charges if the

cases were dismissed. Additionally, he had difficulty remembering some of the incidents until the Defense Security Service (DSS) investigator refreshed his memory.

The Applicant was asked in question 24 if he had ever been charged with or convicted of any offenses related to alcohol or drugs. He answered "no," but had been arrested 18 years earlier--in June 1980--for possession of marijuana and in 1996 for drinking outside of a METRO station. In question 26 the Applicant was asked if, during the previous seven years, he had been arrested for, charged with, or convicted of any offense not previously listed. The Applicant answered "no" to this question failing to list his 1996 drinking citation at the METRO station. He failed to mention the citation because he thought the case had been dismissed or dropped. (tr. 46)

Question 27 asked the Applicant if he had ever illegally used marijuana, cocaine, or crack cocaine since age 16 or during the prior seven years, which would be September 1991. He answered "no" to the question even though his last use of crack cocaine occurred in 1997. In question 30 the Applicant was asked if in the past seven years--since September 1991-- his use of alcoholic beverages resulted in any alcohol-related treatment or counseling. He answered "no" even though he had attended an alcohol detoxification program in 1992. Although the program contained alcohol detoxification and counseling, the main emphasis was on dealing with his cocaine addiction. He failed to list it because he considered it drug treatment, not alcohol treatment.

### 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.

Conditions that could mitigate security concerns include:

- a. The drug involvement was not recent.
- c. A demonstrated intent not to abuse any drugs in the future.

**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.

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. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None Apply.

**CRIMINAL CONDUCT (Guideline J) The Concern:** 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:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- f. There is clear evidence of successful rehabilitation;

### **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 has satisfied its initial burden of proof with regard to its security concerns over Applicant's drug involvement (Guideline H). The Applicant has a 17-year history of illegal drug use starting in 1980 and ending in October 1997, when the Applicant was 37 years old. Disqualifying Condition (DC) a. [\(2\)](#) applies. In October 1997, the Applicant used cocaine after an 11-month abstinence. Except for the one time "slip," the Applicant has not used illegal drugs since 1996. With more than five years since his last regular use, and more than four and a half years since any use, his use is not recent. Mitigating Condition (MC) a. [\(3\)](#) applies. Additionally, the Applicant has expressed an intent not to use illegal drugs in the future. His expressed intent, supported by the period of his abstinence, is sufficient to apply MC c. [\(4\)](#) I find for the Applicant as to SOR subparagraph 1.a. The Applicant did use cocaine for five years after his 1992 drug treatment, but his abstinence since his last use is sufficient for me to find for the Applicant as to SOR subparagraph 1.b.

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, therefore pose a serious potential risk to the nation's security precautions which go to the very heart of the nation's security system.

In September 1998, when the Applicant completed his Standard Form 86, he gave false answers about his police record and illegal drug usage. In response to question 21, the Applicant listed two arrests, a 1987 burglary and a 1980 disorderly conduct arrest. There is no evidence the Applicant was arrested more than once for burglary, which occurred in 1978. However, the Applicant mistakenly listed the burglary as 1987. Accordingly, subparagraph 2.a. is resolved in favor of the Applicant.

In response to Question 24, the Applicant failed to list his 1980 arrest for having a two-dollar bag of marijuana as a violation of the Uniform Narcotics Act but did list a 1980 arrest for disorderly conduct in response to question 21. These two incidents are one and the same. Additionally, the Applicant failed to list his 1996 citation for drinking beer while waiting for his METRO bus. The Applicant failed to list the citation because he thought it had been dismissed. The Applicant did not remember some of his past incidents until the DSS investigator refreshed his memory. Subparagraph 2.b is resolved in favor of the Applicant.

In response to Question 26, concerning other offenses, he failed to list his 1996 citation for drinking beer while waiting for his bus. For the same reasons previously discussed, Subparagraph 2.c. is resolved in favor of the Applicant.

When asked in Question 27 about his illegal drug use during the previous seven years--which would include the period to September 1991-- the Applicant answered "no" even though he had been addicted to cocaine. Additionally, he had last used cocaine in October 1997 which was less than a year before he completed the questionnaire. Subparagraph 2.d. is resolved against the Applicant.

When asked in Question 30 about his alcohol related treatment during the previous seven years, the Applicant answered "no" even though he had attended an alcohol detoxification program during 1992. The Applicant attended a drug treatment program which contained alcohol detoxification and alcohol counseling. The Applicant was in treatment for his addiction to crack cocaine and thought of the treatment as primarily drug related and not alcohol related. Subparagraph 2.e. is resolved in favor of the Applicant.

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. The Applicant gave a false answer on his Std. Form 86. to Question 27. By certifying falsely that his response was true, complete and correct to the best of his knowledge and belief, and made in good faith, the Applicant violated Title 18, Section 1001 <sup>(5)</sup> of the United States Code. His false answer is felonious conduct under the laws of the United States.

Because of this serious misconduct, there should be compelling reasons before a clearance is granted or continued. Candor is important, and the Applicant was unable or unwilling to be candid about his background. The period of time from the most recent falsification--September 1998--to the closing of the record, is insufficient to mitigate the Government's case.

The awarding of a security clearance is not a once in a life time occurrence, but is based on the factors, both disqualifying and mitigating, as set forth in the directive, to the evidence presented. A clearance at this time is not warranted. This determination is not a questioning of the Applicant's patriotism and should not be seen as such.

In reaching my conclusions I have 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.

### **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 (Illegal Drug) FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2 Guideline E (Personal Conduct) AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: Against the Applicant

Subparagraph 2.e.: For the Applicant

Paragraph 3 Guideline J (Criminal Conduct) 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 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. MC a. The drug involvement was not recent

4. MC c. A demonstrated intent not to abuse any drugs in the future.

5. Title 18, Section 1001 of the United States Code provides: 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. §3359(a); with regard to the maximum fine authorized (\$250,000), see 18 U.S.C. §3571.