

DATE: June 25, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-07651

## **DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Matthew Malone, Department Counsel

#### **FOR APPLICANT**

Stephen Glasman

### **SYNOPSIS**

On three different Questionnaires for National Security Positions, Standard Form (Std. Form) 86 in 1990, 1995, and 1997, the Applicant provided false answers concerning his drug usage. On his 1999 security clearance application the Applicant failed to list he had left the service under unfavorable circumstances. Clearance is denied.

### **STATEMENT OF THE CASE**

On September 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 October 2, 2001, the Applicant answered the SOR and requested a hearing. The case was assigned to me on January 14, 2002. A Notice of Hearing was issued on February 14, 2002, scheduling the hearing which was held on March 22, 2002. The Government's case consisted of nine exhibits (Gov. Ex.). The Applicant relied on his own testimony and three exhibits (App. Ex.). The record was held open to allow the Applicant to submit additional documents. Following the hearing, a single, submission was received. On April 3, 2002, Department counsel having no objection to its admission, the submission was admitted as App. Ex. D. A corrected copy of the transcript (tr.) of the hearing was received on April 2, 2002.

### **FINDINGS OF FACT**

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J). The Applicant admits with explanation some of the allegations and denies the rest. Although the government has not alleged the Applicant's illegal use of cocaine, his usage is relevant as that usage relates to the falsification allegations.

The Applicant is 39 years old, has worked for a federal contractor since 1999, and is seeking a security clearance. The Applicant served as an officer in the U.S. armed forces from 1985 through 1998. Except for his cocaine use, the Applicant's military service was outstanding. (App. Ex. A) While in the service, the Applicant was a flight officer with

56 combat missions and held very selectively staffed positions including as an admiral's aid and selection for post graduate education in 1993 through 1995. The Applicant's grade point average was sufficiently high to allow him to attain three degrees in his post graduate education, a singular accomplishment at the post graduate school. The Applicant's two Fitness Reports (App. Ex. B), between November 1996 and November 1997, indicated the Applicant "greatly exceeds standards," was exceptionally skilled and talented, a recognized expert, and recommended for early promotion. From ay 1982 though August 1998, the Applicant held a secret clearance and numerous other clearances while in the service.

The Applicant attended a U.S. service academy. Following graduation, he was selected to be on a sailing team, while waiting for service flight training. Following graduation in 1985 and through 1986, the Applicant--at age 22 and 23--used cocaine on an average of once every three weeks. (Gov. Ex. 4) During this period, the Applicant was in the service, but was not receiving military pay for his participation on the sailing team. In 1988, the Applicant reported for active duty. In December 1990, just prior to leaving for the Gulf War, the Applicant was at a party and used cocaine once which he blames on his youth. (Gov. Ex. 8) In July 1991, just after his deployment to the Gulf war, he was at a party and used cocaine again. The Applicant indicated he used the cocaine to join with the others at the party and to impress the girl he was with. (Gov. Ex. 7) He was with the same friends he was with at the 1990 party. At the party, the Applicant contributed \$50.00 into a common fund, which was used to purchase cocaine. The Applicant made a July 2001-sworn statement to a Defense Security Service (DSS) special agent. In that statement the Applicant stated, under drug use, "latter 91 - couple times w/ friends." (Gov. Ex. 4) He also lists two uses in 1991 on his November 1997 Questionnaire for National Security, Std. Form 86. (Gov. Ex. 2) In March 1994, he used cocaine one time with a friend who had been at the previous two parties. The Applicant indicates this usage was due to peer pressure. His friend wanted him to join him "for old times sake." (Gov. Ex. 8)

In March 1997, he went to dinner at the home of two acquaintances. After dinner they asked the Applicant if he wished to use cocaine. The Applicant declined the offer but stated he had no objection to the couple using cocaine, which the couple did. After the watching the couple use the cocaine, the Applicant ran his finger through the dust/residue on the mirror and touched his finger to his tongue. The Applicant had no explanation why he did not leave when the couple offered him cocaine. Nor did he have an explanation as to why he ran his finger through the residue and touched his tongue. He did not consider his action to be "using" cocaine.

The Applicant was scheduled to leave the service in December 1997. In the Summer of 1997, the Applicant submitted his resignation from the service, after deciding to pursue a job offer from another government agency. Knowing the job offer was contingent on the results of a "life style" polygraph, the Applicant decided to disclose his use of cocaine while on active duty. After discussing the matter with his wife, he told her he was going to "bear his soul" about his prior drug use hoping the government would look past his usage and look at the whole man. In September 1997, the Applicant completed a Questionnaire for Sensitive Positions<sup>(2)</sup> and for the first time on any security questionnaire admitted using cocaine three times, once each in January 1990, February 1991, and January 1994. (Gov. Ex. 2) In June 1998, the Applicant's request for resignation not having been previously accepted, he was required to show cause for retention in the service, due to his illegal drug usage disclosures. (Gov. Ex. 9) In lieu of going through a show cause hearing, the Applicant submitted a qualified resignation request. After 13 years of service, the Applicant's request was accepted and he was discharged with a "General (Under Honorable Conditions) Discharge."

In July 1988, when the Applicant completed a Personnel Security Questionnaire (PSQ) (Gov. Ex. 5) he answered "no" to question 20.a. which asked if he had ever used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) or cannabis (to include marijuana or hashish), except as prescribed by a licensed physician. His answer was false because he had used cocaine on an average of once every three weeks between graduation in 1985 and through 1986 while participating on the sailing team.

In September 1990, when the Applicant completed a second PSQ (Gov. Ex. 4) he again answered "no" to question 20. which asked him about his illegal drug use. This answer was false because of his usage in 1985 and 1986.

In October 1995, when the Applicant completed a third PSQ (Gov. Ex. 3) he answered "no" to question 22.a., which asked if he had 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? This answer was false because of his usage in 1985, 1986, 1990, 1991, and 1994.

In November 1997, the Applicant completed a Questionnaire for National Security Position, Std. Form 86. (Gov. Ex. 2). In response to question 23, when asked about his illegal drug activity during the prior seven years, the Applicant indicated he had used cocaine four times, once in 1990, twice in 1991, and once in 1994. The Applicant did not mention his March 1997 "tasting" of the cocaine residue which had occurred eight months earlier, because he did not consider his action to be "use." The Applicant considered use to be inhaling of cocaine which he considers the normal method of ingesting cocaine. This was the first questionnaire completed by the Applicant which limited the time period under consideration to the prior seven years. Therefore, his usage during 1985 and 1986 was outside the scope of the question.

In October 1999, the Applicant completed a Security Clearance Application (Gov. Ex. 1). In response to question 27, which asked about his illegal drug activity during the prior seven years, the Applicant indicated he had used cocaine four times, once in 1990, twice in mid 1991, and once in 1994. He did not indicate his March 1997 tasting of the cocaine residue because he did not consider it "use."

In response to question 20. , the Applicant was asked if during the prior 10 years he had ever been fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following allegations of misconduct or unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. The Applicant answered "no" to the question even though he had left the service with a general discharge in lieu of facing a show cause hearing. The Applicant said his response was an oversight. He thought his service career would be known to the investigators and thought the question applied only to his civilian employment following his military service. Additionally, he did not consider his leaving the service to be under adverse conditions, even though facing a show cause hearing, because he received an honorable discharge under general conditions. He states he had no intention to deceive when he answered question 20.

The Applicant made signed, sworn statements in April 1998 (Gov. Ex. 8), March 2000 (Gov. Ex. 7) and July 2001 (Gov. Ex. 6). All three statements discuss his cocaine usage in 1990, 1991, and 1994, but only his most recent statement--July 2001-- mentions his 1985-1986 usage and his March 1997 tasting. The Applicant never provided details about his usage with the sailing team on his prior two statement because he was not asked about it.

In May 1993, the Applicant married and now has four children. When he began dating his wife, he started attending church after a period of absence. He became more and more involved and decided to take steps to rejoin the church of his youth. His readmission into the church was a major event in his life. The Applicant acknowledges his actions while in the service were "stupid," and that his aberrant behavior was unacceptable. He never intended his behavior to affect anyone other than himself and now understands how his selfishness has affected and impacted his family. He is now older, matured, married, a father, church member, and part of the community. His life is now grounded on his family and children. He takes security matters seriously and wants to be able to contribute to the country's defense. He states he has fully disclosed his prior drug usage and has nothing to hide.

## **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:

**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:

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 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.

The Applicant completed four security clearance questionnaires in which he provided false answers concerning his illegal drug usage. Disqualifying Condition (DC) 2-(3) applies.

Following his graduation from a U.S. service academy the Applicant was selected to be on the sailing team. While on that team he used cocaine on average once every three weeks. The first time the Applicant mentions this use was on a signed, sworn statement in July 2001. He failed to indicate the usage on his July 1988 PSQ, September 1990 PSQ, and October 1995 PSQ. This usage was not listed on the Applicant's 1997 Questionnaire for National Security Position (Gov. Ex. 2) nor on his 1999 Security Clearance Application (Gov. Ex. 1), but scope of time considered in the questions of those forms was limited to the prior seven years.

In December 1990, just prior to leaving for the Gulf War, the Applicant used cocaine at a party. In July 1991, just after his deployment to the Gulf war, he twice used cocaine again at a party. In March 1994, he used cocaine one time with a friend "for old times sake." (Gov. Ex. 8) And in

March 1997, he ran his finger through the cocaine dust/residue on the mirror and touched his finger to his tongue.

When the Applicant completed his September 1990 PSQ, he gave a false answer when asked about his illegal drug usage. He answered "no" to question 20. even though he had used cocaine every three weeks, at times, during 1985 and 1986. None of the mitigating conditions (MC) apply to his false answer. MC 1-(4) does not apply because the information concerning his drug usage was pertinent to a determination. MC 2-(5) does not apply to the September 1990 falsification because, although not recent, it was not an isolated incident for he provided false answers about his illegal drug usage on four separate forms. His 1985 and 1986 cocaine use was never revealed until July 2001 in response to specific questioning by the DSS. Because there was no showing of a prompt, good-faith effort to correct the falsification before being confronted with the facts, MC 3-(6) does not apply. MC 4-(7) is inapplicable since the omissions were not caused by improper or inadequate advice of an authorized person. MC 5-(8) is inapplicable because vulnerability to coercion, exploitation, or duress was not alleged. MC 6-(9) is inapplicable because there was no refusal to cooperate based on advice from legal counsel. MC 7-(10) is inapplicable because association with persons involved in criminal activities was not alleged. I find against the Applicant as to SOR subparagraph 1.a.

When the Applicant completed his October 1995 PSQ he gave a false answer when asked about is illegal drug usage. He answered "no" to question 22.a. even though he had used cocaine in 1985, 1986, 1990, 1991, and 1994. None of the mitigating conditions apply. I find against the Applicant as to SOR subparagraph 1.b.

On his November 1997 Questionnaire for National Security Position, the Applicant failed to list his cocaine use in March 1997 (tasting of the cocaine residue) because he did not consider his action to be "use." He defined "use" to be inhaling of cocaine which he considers the normal method of ingesting cocaine. The question is sufficiently broad that the Applicant should have indicated his tasting which had occurred eight months earlier. The same reasoning was used by the Applicant for his failure to included the March 1997 tasting on his April 1998 and March 2000 signed, sworn statements to the DSS in April 1998, and on his October 1999 Security Clearance Application, in response to question 27. None of the mitigating conditions apply. I find against the Applicant as to SOR subparagraphs 1.c., 1.d., and 1.g.

The Applicant's failure to indicate his March 1997 tasting of cocaine on his October 1999 Security Clearance Application has previously been addressed. On that same form he answered "no" to question 20. which asked if he had ever been fired from a job, quit a job after being told he would be fired, left a job by mutual agreement following allegations of misconduct or unsatisfactory performance, or left a job for other reasons under unfavorable circumstances. The Applicant had left the service with a general discharge in lieu of facing a show cause hearing. The Applicant said his response was an oversight and, additionally, he did not consider his leaving the service to be under adverse conditions, even though he was facing a show cause hearing. After serving 15 years as a military officer, the Applicant was informed he had to show cause why he should be retained in the service due to the disclosure of his illegal cocaine usage. In lieu of going to the show cause hearing, the Applicant chose to request a discharge and was granted an honorable discharge under general conditions. Such an action by so senior an officer was equivalent to

leaving the job under unfavorable circumstances. The Applicant gave a false answer to question 20. None of the mitigating conditions apply. I find against the Applicant as to SOR subparagraph 1.e.

On the same form, in response to question 28., asking if he had ever used illegal drugs while possessing a security clearance, he answered "yes" and listed four occasions of cocaine use between December 1990 and March 1994. He failed to list his March 1997 cocaine tasting and, since the question is not limited to the prior seven years, he also failed to list his cocaine use during 1985 and 1986. Although both uses occurred when the Applicant was a military officer holding a security clearance, only the March 1997 usage was alleged. None of the mitigating conditions apply. I find against the Applicant as to SOR subparagraph 1.f.

Because the falsifications occurred on so many forms spanning a period of eleven years and because his most recent falsifications occurred on his October 1999 security clearance application, I find against the Applicant as to Personal Conduct (Guideline E).

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 the applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. The Applicant gave false answers on his Std. Forms 86. and in his statements to the DSS. By certifying falsely that his responses were true, complete and correct to the best of his knowledge and belief, and made in good faith, the Applicant repeatedly violated Title 18, Section 1001 of the United States Code, a felony.

Because of his 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. Accordingly, subparagraph 2.a. is resolved against the Applicant.

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.

The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. Under the Applicant's current circumstances a security clearance is not recommended, but this decision should not be construed as a determination the Applicant's conduct could never justify the award of a DoD security clearance. Should the Applicant be afforded an opportunity to reapply for a security clearance, in the future, he may well demonstrate persuasive evidence of his security worthiness. Because of the numerous falsifications made on five questionnaires and in two sworn statements made over an extensive period of time, a security clearance at this time is not warranted.

### **FORMAL FINDINGS**

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

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.: Against 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 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. A copy of this questionnaire was not introduced at the hearing.
3. DC 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.)
4. MC 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.
5. MC 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
6. DC 3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. (E2.A5.1.2.3.)
7. 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.
8. MC 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.
9. 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.
10. MC 7. Association with persons involved in criminal activities has ceased.