

DATE: August 15, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-11501

## **DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant smoked marijuana from 1992 through 1999, and from 1994 to February 1998, she facilitated her boyfriend's dealing in illegal drugs. Applicant deliberately did not reveal on her September 1999 security clearance application her illegal drug involvement or a 1994 arrest for assault. She was also not candid in April 2000 and July 2000 sworn statements about her use of marijuana or the assistance provided her boyfriend in his illegal drug activities. There is no persuasive evidence that her lifestyle is no longer conducive to drug use so the risk of future involvement with illegal drugs cannot be discounted. Applicant's repeated, deliberate falsifications cast doubt on her judgment, reliability and trustworthiness. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4 and the implementation of 10 U.S.C. §986), issued a Statement of Reasons (SOR), dated February 14, 2002, 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR alleged illegal drug involvement (guideline H); criminal conduct (guideline J) related to her arrests in 1993 for possession of cocaine with intent to distribute and in 1994 for assault, and her actions in support of an illegal drug enterprise from 1994 to 1998; and personal conduct (guideline E) due to deliberate falsification of her security clearance application and two sworn statements.

On February 27, 2002, Applicant responded to the allegations set forth in the SOR and requested that her case be determined on the written record in lieu of a hearing. The Government submitted its File of Relevant Material (FORM) on April 11, 2002, a copy of which was forwarded to Applicant with instructions to submit additional information

and/or any objections within thirty days of receipt. Applicant filed an undated response, received by DOHA on June 13, 2002, to which Department Counsel indicated he had no objection. On July 29, 2002, the case was assigned to me for a decision.

## FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 26-year-old secretary employed by a defense contractor providing staff support for a military development engineering unit. Since mid-July 1999, Applicant has been assigned as the branch secretary for the engineering division. She seeks a Secret security clearance for her duties.

In 1992, when she was about sixteen, Applicant tried marijuana when it was passed to her by friends. That same year, Applicant became acquainted with a drug dealer when he was on a weekend pass from the facility where he was serving time for criminal drug sales. Applicant and this drug dealer became romantically involved, and they had a child born in February 1993. Applicant smoked marijuana three to four times per year between 1992 and 1994 as she found the drug relaxing.

From 1994 to February 1998, Applicant and this drug dealer lived together as cohabitants. In September 1994, she was arrested for domestic assault after a policeman saw her strike her live-in boyfriend outside of her mother's home. The charge was filed for one year on the condition Applicant attend court-ordered counseling. Applicant completed two sessions at a local child and family services agency, and the charge was subsequently dismissed.

Applicant worked as a dietary aid at a local nursing home while pregnant with their second child, who was born in mid-May 1995. From May 1995 to October 1997, Applicant smoked marijuana daily, primarily with her live-in boyfriend, who supported himself and contributed to the support of the family by selling drugs. Between 1994 and 1996, Applicant helped him bag the marijuana he planned to sell. A few times per year between 1994 and February 1998, Applicant drove her live-in boyfriend to locations where he would either pick up or sell marijuana and cocaine. On occasion, he sold drugs in her presence.

Circa October 1997, Applicant became pregnant with their third child so she stopped using marijuana. In February 1998, Applicant's boyfriend was incarcerated in an adult correctional institute after he was apprehended for selling cocaine. A child was born to Applicant and this boyfriend that July. Applicant continued to abstain from marijuana since she was breast-feeding.

While working as a teacher's aide in a Head Start program, Applicant from November 1998 to April 1999 pursued computer training at a local vocational/technical institute. Over the April to mid-May 1999 time frame, Applicant smoked marijuana twice, purchasing it at a cost of \$10.00 on each occasion. When Applicant used marijuana in May 1999, she was alone at her mother's home.

In July 1999, Applicant went to work as a word processor II for her present employer, a defense contractor. Aware an investigation would be conducted into her background, Applicant abstained from marijuana use as family members continued to smoke marijuana in her presence.

On September 16, 1999, Applicant executed a security clearance application (SF 86), EPSQ version. Applicant responded "YES" to question 21 concerning whether she had ever been charged with or convicted of any felony offense, and listed an unidentified offense (mistakenly dated as 1994) for which she had served probation and the record had been sealed. Concerned that she might lose her job, Applicant deliberately did not disclose her 1994 arrest for assault in response to question 26 ["In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, reported information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S. C. 844 or 18 U.S.C. 3607."]. She also falsely answered "NO" to question 27 regarding any illegal drug use in the last seven years ["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?"]], and to question 29 ["In the last 7 years, have you 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?"]].

On April 19, 2000, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about her arrest record. As reflected in a signed sworn statement executed on that date, with regard to her arrest for possession of cocaine at age seventeen, Applicant indicated that as she approached her friend's door, her friend's cousin yelled to her from inside the house and asked her to pick up a napkin from the ground. As she retrieved the napkin, she was immediately apprehended by the local police and charged with possession of cocaine. Applicant denied any personal involvement with illegal drugs, to include any use of cocaine. Regarding her arrest for domestic assault, Applicant admitted she had been arguing with her boyfriend, but she denied striking him. Asked about her failure to disclose her arrest record accurately on her SF 86, Applicant denied any intent to mislead the Government, and indicated she thought she had listed the domestic assault charge on her security clearance application.

On July 12, 2000, Applicant was reinterviewed by the same agent, this time about her relationship with her then incarcerated boyfriend. Applicant admitted his paternity with respect to their three children, but claimed they had never cohabitated. Applicant acknowledged knowing of her boyfriend's illegal drug sales while denying any involvement on her part in his illegal activities. Applicant executed a sworn statement in which she expressed a willingness to undergo a polygraph examination to prove the truth of her statements.

On his release from prison in August 2000, Applicant's boyfriend moved back in with Applicant and their children. He resumed his illegal drug use as well as drug sales. Although Applicant did not approve of his drug activity, she allowed him to continue to keep marijuana in their home and to use marijuana in her presence.

On November 14, 2000, Applicant was interviewed by another DSS special agent. Applicant admitted she had knowingly withheld information about her arrests, her involvement with illegal drugs, and cohabitation with her boyfriend because of concern for her employment. Applicant volunteered that she and her boyfriend resumed cohabitation following his release from incarceration in August 2000. Aware he continued to support himself and contributed to the support of their family by selling drugs, Applicant expressed her disapproval of his illegal drug activity but professed her love for him. Applicant detailed her abuse of marijuana to May 1999, including daily use from May 1995 to October 1997 when she felt "addicted" to the drug. Applicant related she was around marijuana "all the time" as of November 2000, since her boyfriend, his family, and her family members all smoked marijuana when they got together socially, but she denied any current use of the drug on her part. Applicant indicated she had no plan to use marijuana, but she could not promise that she would never use it again. Applicant detailed the assistance she provided her boyfriend in his drug dealing. In response to the agent's inquiries into whether her coworkers knew of her boyfriend's criminal activities, Applicant admitted her professional associates were not aware even of her boyfriend's identity, and she would not tell the truth about his drug activities if confronted by a coworker. With respect to her juvenile drug-related arrest, Applicant acknowledged she had been aware that her friend's cousin was a drug dealer wanted by the police. As for her September 1994 arrest for assault, Applicant admitted she had slapped her boyfriend in the face. Citing the efforts she had made to pursue a career and raise her children, Applicant indicated her boyfriend's criminal conduct had no impact on her job. She expressed regret at her past mistakes and asked that they not affect her employment.

In August 2001, Applicant became a client in a transitional housing program. With the help of her coworkers, Applicant moved with her children into a housing development. She has been responsible in her financial obligations to the program.

As the branch secretary supporting a military engineering division since July 1999, Applicant has performed her duties with dedication and proficiency. Her coworkers confirm her self-motivation at work and her desire to provide a safe, clean environment for her three children. They recommend grant to Applicant of the Secret security clearance.

## **POLICIES**

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. See Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case: [\(1\)](#)

### Drug Involvement

The Concern:

a. 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.

b. Drugs are defined as mood and behavior-altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants and hallucinogens); and

(2) Inhalants and other similar substances.

c. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

a. Any drug abuse (see above definition);

b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

*Conditions that could mitigate security concerns include:*

a. The drug involvement was not recent

### Criminal Conduct

*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

### **Personal Conduct**

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:*

E2.A5.1.2.2. 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.A5.1.2.3. 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.A5.1.2.5. A pattern of dishonesty

*Conditions that could mitigate security concerns include:*

None

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### **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 its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue her 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 she 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

### **CONCLUSIONS**

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to guidelines H, J and E:

A casual user of marijuana in her teens, Applicant's involvement increased dramatically after she began to cohabitate with a drug dealer. Following the birth of their second child, Applicant smoked marijuana daily with her live-in boyfriend until October 1997, when she became pregnant with their third child. Until February 1998, when he was incarcerated for his criminal drug sales, Applicant facilitated her boyfriend's illegal drug activities, bagging drugs for him and driving him to locations of illegal drug transactions. After a significant period of personal abstinence from marijuana when she was pregnant and then breast-feeding, Applicant used marijuana at least twice in 1999, once on Mother's Day when she was alone at her mother's house, not subject to her boyfriend's influence. The extent to which marijuana was a part of Applicant's lifestyle is evident in her purchase of marijuana for her own consumption in spring 1999. Disqualifying conditions (DC) a. any drug abuse, and b. illegal drug possession, purchase, sale or distribution, under guideline H must be considered in evaluating Applicant's security worthiness.

The Directive provides for mitigation of illicit drug involvement if the drug use was not recent, it was isolated or aberrational, there is demonstrated intent not to abuse any drugs in the future, or 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. Strictly in terms of the passage of time, Applicant's drug involvement is not especially recent. However, a determination as to the risk of relapse must take into account not only the date of last use, but also the extent and duration of past involvement and the circumstances of her use. As recently as November 2000, Applicant's family members and her live-in boyfriend were still using marijuana when socializing with her. Although Applicant had been abstinent since mid-May 1999 and had no plans to use marijuana as of November 2000, she would not say that she would never use marijuana again. For mitigating condition c. (demonstrated intent not to abuse any drugs in the future) to apply, there must be an intent to forego all future involvement and concrete action reflecting that intent, maintained for a long enough period to reasonably guarantee against recurrence. To her credit, Applicant became involved in a transitional housing program in August 2001, and with the help of coworkers, she moved with her children to a new residence "to get away from the drama that was surrounding [her]." It may well be that Applicant left her home because of the illegal drug activity there, although it was not explicitly stated. With limited information of record about her current personal relationships and activities, I am unable to conclude that her drug use is safely of the past. In August 2000, Applicant allowed the father of their children to move back in with her after he was released from prison. In November 2000, while she expressed the hope that he would change, she also indicated she was in love with him. The burden is on Applicant to demonstrate that her lifestyle is no longer conducive to illegal drug use and the record is not clear in this regard. Subparagraphs 1.a. and 1.b. are therefore resolved against her.

With respect to guideline J, criminal conduct, Applicant does not deny that she was arrested as a juvenile in 1993 for felony possession of cocaine after she picked up a package for a friend's cousin, who was known by her to be a drug dealer wanted by the police. She also admits she struck her live-in boyfriend in the face during an argument in 1994, and that she helped her boyfriend in his illegal drug sales between 1994 and February 1998 by packaging drugs for him to sell and driving him to locations to buy and sell drugs. Her criminal conduct falls within disqualifying conditions a., any allegations or admissions of criminal conduct and b., multiple lesser offenses. With respect to the conduct alleged under guideline J, there has been no recurrence in more than four years. However, Applicant demonstrated a more recent disregard for the law when she lied on her SF 86 and in two sworn statements.<sup>(2)</sup> Since the false statements were alleged as raising only guideline E concerns, a finding of recent criminal conduct cannot be made against her on the basis of deliberate misrepresentation. However, her false statements can be considered in assessing the extent of her rehabilitation and in determining whether a given adjudicative factor applies. With the record unclear as to Applicant's present relationship, if any, with the father of her children, and with her recent false statements raising questions about her reform, adverse findings are warranted with respect to subparagraphs 2.b. and 2.c. of the SOR. The incident alleged in SOR subparagraph 2.a. is mitigated by her immaturity, the lack of any criminal predisposition on her part with respect to the possession of cocaine and changed circumstances.

In an effort to protect her employment, Applicant did not disclose on her SF 86 her 1994 arrest for assault or her illicit drug involvement. Deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities raises

serious personal conduct (guideline E) concerns. (See DC E2.A5.1.2.2.). Furthermore, when presented with the opportunity to set the record straight during her first subject interview, Applicant in April 2000 falsely claimed, as reflected in a signed sworn statement, that she did not strike her boyfriend on the occasion of her arrest for domestic assault and she had never used or been involved with any illegal drug. In a subsequent interview of July 2000, Applicant repeated the false denial of any illegal drug use on her part and she was also not candid about her relationship with the father of her three children. The misrepresentations during in-person interviews fall within DC E2.A5.1.2.3. (deliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security or trustworthiness determination). Furthermore, there is a sufficient pattern of dishonesty to consider DC E2.A5.1.2.5. as well.

Under the Directive's adjudicative guidelines pertinent to personal conduct, the knowing and willful misrepresentation of material facts is potentially mitigated provided the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness or reliability (MC E2.A5.1.3.1.); the falsification was isolated, not recent, and the individual has subsequently presented correct information voluntarily (MC E2.A5.1.3.2.); the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts (MC E2.A5.1.3.3.); or the 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 (MC E2.A5.1.3.4.). None of these mitigating conditions apply in this case. Use of marijuana within six months of her application for security clearance is information clearly pertinent to a determination of judgment, trustworthiness or reliability. In addition to the demonstrated disregard for the laws proscribing involvement with controlled dangerous substances, there is an unacceptable risk of disclosure of classified information when one is under the influence. While the Government is now aware of the adverse drug involvement and criminal record information, including Applicant's marijuana use and purchase, and her acts in facilitation of her boyfriend's drug dealing, her November 2000 rectification cannot reasonably be viewed as prompt or in good faith.

Applicant has expressed remorse for her falsifications, but she continues to provide excuses for her behavior which undercut her claim of reform. In response to the SOR, Applicant stated, "I'm sorry I was not honest from the start but I'm not proud of my past and I've block (sic) a lot of it out." In characterizing her falsifications as "thoughtless incidents," Applicant shows little appreciation for the seriousness of her failure to be completely forthright. While career advancement and a stable lifestyle are laudable objectives, the Government can ill afford individuals determining for themselves the timing and extent of disclosure. Adverse findings are returned with respect to subparagraphs 3.a., 3.b., 3.c., 3.d., and 3.e. of the SOR.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline H: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Guideline J: AGAINST THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Paragraph 3. Guideline E: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: Against the Applicant

Subparagraph 3.c.: Against the Applicant

Subparagraph 3.d.: Against the Applicant

Subparagraph 3.e.: 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 Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. The adjudicative guidelines considered most pertinent are identified as set forth in guidelines H, J and E following the implementation of 10 U.S.C. §986. For example, the disqualifying condition for any drug abuse is cited as DC a. as opposed to DC E2.A8.1.2.1.
2. In signing the SF 86 (Item 4), as well as the voluntary statements provided to the DSS on April 19, 2000 (Item 7), and July 12, 2000 (Item 6), Applicant certified she understood that a knowing and willful false statement could be punished by a fine or imprisonment or both, pursuant to Title 18, Section 1001 of the United States Code.