

DATE: December 8, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-14406

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Nygina Mills, Esq, Department Counsel

#### **FOR APPLICANT**

Kenneth Sigman, Esq.

### **SYNOPSIS**

For nearly 20 years Applicant used the inhalant butyl nitrite. He used butyl nitrite while holding a security clearance and in violation of a federal policy prohibiting the improper use of drugs by individuals entrusted with security clearances. He also used butyl nitrite the day before meeting with a federal security investigator regarding his security clearance. Applicant deliberately killed a neighbor's dog because the animal's barking annoyed him. Applicant's criminal behavior, drug abuse, poor judgment, and unwillingness to comply with rules and regulations raise serious concerns about his security worthiness. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On April 15, 2003, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct), Guideline H (Drug Involvement), and Guideline E (Personal Conduct) of the Directive. Applicant's answer to the SOR was received by DOHA on May 20, 2003. Applicant elected to have a hearing before an administrative judge. The case was transferred to me from another judge due to a change in regional assignments on June 30, 2003. A notice of hearing was issued on July 3, 2003 setting July 23, 2003 as the date for a hearing in this matter. By facsimile communications filed July 18 and 21, 2003, Applicant requested a continuation of his hearing to an unspecified time. Department Counsel objected to Applicant's request. By Order dated July 22, 2003, I denied Applicant's request for a continuance because he had not shown good cause for a delay. On July 23, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>(3)</sup> DOHA received the transcript (Tr.) of the proceeding on July 31, 2003.

### **FINDINGS OF FACT**

The SOR contains six allegations of disqualifying conduct. One allegation relates to conduct charged under Guideline J,

Criminal Conduct. Three allegations relate to conduct charged under Guideline H, Drug Involvement. Two allegations relate to conduct charged under Guideline E, Personal Conduct. Applicant admitted the factual allegations of criminal conduct and illegal drug use as set forth in subparagraphs 1.a., 2.a., 2.b., and 2.c. of the SOR. He did not specifically admit or deny the allegations in subparagraphs 3. a. and 3.b. of the SOR involving questionable judgement untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations in relation to his admitted criminal conduct and illegal drug use. Applicant's admissions are incorporated as findings of fact.

Applicant is 40 years old, single, and employed by a defense contractor. He was hired as a senior consultant by his employer approximately six years ago. About three years ago he was promoted and is currently responsible for leading a work group of full and part-time employees. He holds a bachelor of arts degree and a master of business administration degree.

By decision dated June 17, 1999, an official of a federal agency denied Applicant access to Sensitive Compartmented Information. The decision was based on Applicant's long-term use and abuse of a controlled substance identified as amyl nitrate, (4) in violation of a personnel security policy advisory in which he agreed to abide by the agency's policy concerning the improper use of drugs. (Ex. 4, at 3.) The decision recited that Applicant had used amyl nitrate the night before an interview with a security service interviewer on January 25, 1999, and had demonstrated questionable character and judgment in killing a neighbor's dog in 1994. (Ex. 4, at 4.) Applicant appealed the decision, which was upheld in a first appeal review, dated September 8, 1999, and in a final action decision of the agency, dated December 2, 1999. (Ex. 4, at 13.)

Applicant began abusing butyl nitrite, also identified by him as "poppers," (5) in 1981 as a high school student. ( Tr. 40-44.) For 18 years, Applicant continued to use butyl nitrite to enhance his sexual pleasure. (Ex. 3, at 1-2.) He used butyl nitrite after being granted a security clearance in 1997 and after signing a statement, dated October 13, 1998, required of him by the federal agency with whom he was a contractor, in which he agreed to adhere to the agency's policy prohibiting the use of any drug for other than its intended medical purpose. (Ex. 4, at 3.) Applicant's last use of butyl nitrite occurred in 1999.

Applicant admitted that in 1994 he killed his neighbor's dog by drowning it because the dog's barking annoyed him (Ex. 3, at 3.) After killing the dog, Applicant covered its body with leaves and branches. (Ex. 3, at 3.) While Applicant says he feels remorse and shame for the act, he did not tell the police, other relevant authorities, or the dog's owner that he had killed the dog. He did not attempt to make amends with the dog's owner for his act. (Tr. 74-76.)

Applicant completed and signed a security clearance application (SF-86) on November 19, 1998. In response to Question 27 on the SF-86, regarding his use of illegal drugs and drug activity, Applicant stated that in the last 7 years he had used marijuana once. He did not list or discuss his use of butyl nitrite. In response to Question 31 on the SF-86, he answered "no" when asked if the Federal government had ever investigated his background or granted him a security clearance.

On January 25, 1999, Applicant reviewed the SF-86 he had signed and certified on November 19, 1998. He updated his employer's address and his supervisor's telephone number. He corrected his mother's date of birth. He made no further changes or additions, and he then signed and certified his SF-86 again.

In April 2001, Applicant was interviewed by an agent of the Defense Security Service. In a signed sworn statement dated April 24, 2001, Applicant admitted his use and abuse of butyl nitrite during the period of 1981 to 1999. He estimated that he used the inhalant 35 times during the 18-year time period. He stated that he used butyl nitrite and not amyl nitrite. He admitted using butyl nitrite after receiving his security clearance in 1997. He admitted using marijuana once in 1993. He admitted that he killed his neighbor's dog in 1994. (Ex. 3, 1-4.)

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security

and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline J, Criminal Conduct**

In the SOR, DOHA alleged in subparagraph 1.a. that Applicant committed a misdemeanor when he killed his neighbor's dog. The concern under Guideline J is that an Applicant's history or pattern of criminal activity creates doubt about his judgment, reliability, and trustworthiness. E2.A10.1.1. Applicant admitted the crime, which was of particular cruelty, thus raising security concerns under ¶¶ E2.A10.1.2.1 and E2.A10.1.2.2 of Guideline J.

The security concerns about this conduct are mitigated in part because the record facts establish that the crime is not recent, having occurred nine years ago, and it appears to have been an isolated incident. Thus mitigating conditions ¶ E2.A10.1.3.1 and ¶ E2.A10.1.3.2 of Guideline J apply. However, while Applicant expresses regret over killing his neighbor's dog, he has not taken responsibility for the act. He has never reported his action to the police or to other responsible civic authorities. He has never told the owner of the dog of his act or made any effort to make amends for the crime. I conclude, therefore, that Applicant has not provided evidence of successful rehabilitation for his criminal act, and thus mitigating condition ¶ E2.A10.1.3.6. does not apply to the facts of his case. Accordingly, allegation 1.a. of the SOR is concluded against the Applicant.

### **Guideline H, Drug Involvement**

In the SOR, DOHA alleged Applicant had habitually used the inhalant butyl nitrite, an illegal drug, from approximately 1981 to 1999 (¶ 2.a.), that he had used butyl nitrite while holding a security clearance (¶ 2.b.), and that he had used butyl nitrite on January 24, 1999, the day before a security interview with an investigator of the National Security Agency. (¶ 2.c.) The Government's concern with Guideline H conduct is that it raises questions regarding an individual's willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other

chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, and inhalants and other similar substances. ¶¶ E2.A8.1.1.2, E2.A8.1.1.2.1, E2.A8.1.1.2.2. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. ¶ E2.A8.1.1.3.

Applicant admits to drug abuse, which raises a security concern under ¶ E2.A8.1.2.1. He also admits to drug involvement following the grant of a security clearance. ¶ E2.A8.1.2.5. Conditions that could mitigate security concerns regarding drug involvement in this case include: a finding that the drug involvement is not recent (¶ E2.A8.1.3.1); a finding that the drug involvement was an isolated or aberrational event; (¶ E2.A8.1.3.2) and a demonstrated intent not to abuse any drugs in the future (¶ E2.A8.1.3.3.)

The record shows that Applicant's last use of butyl nitrite occurred in January 1999 and his last use of marijuana occurred in 1993. Since his drug involvement is not recent, mitigating condition ¶ E2.A.8.1.3.1 applies. However, mitigating condition ¶ E2.A8.1.3.2 does not apply because Applicant's use of butyl nitrite was neither isolated nor aberrational: it was a lifestyle choice that continued for nearly 20 years. The record is unclear regarding Applicant's demonstrated intent not to abuse any drugs in the future, since his use of butyl nitrite was of a longstanding and habitual nature. Allegations 2.a., 2.b., and 2.c. of the SOR are concluded against the Applicant.

### **Guideline E, Personal Conduct**

In the SOR, DOHA alleged in subparagraphs 3.a. and 3.b. that Applicant's criminal conduct, as alleged in subparagraph 1.a., and his illegal drug use, as alleged in subparagraphs 2.a., 2.b., and 2.c., raised security concerns under Guideline E, Personal Conduct. Guideline E is concerned with conduct or behavior which demonstrates questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty or unwillingness to comply with rules and regulations. Individuals who exhibit such conduct may not possess the personal qualities required to properly safeguard classified information.

Applicant's conduct as identified in the SOR raises concern about his security worthiness under disqualifying condition ¶ E2.A5.1.2.4. His personal conduct relating to the killing of the dog and his use of butyl nitrite are activities which demonstrate questionable judgment and an unwillingness to comply with laws, rules, and regulations. Such conduct increases his vulnerability to coercion, exploitation or duress. If these actions became known, they could affect Applicant's personal, professional, or community standing and render him susceptible to blackmail. Additionally, disqualifying condition ¶ E2.A5.1.2.5. applies to Applicant's conduct. When he used butyl nitrite while holding a security clearance and after executing a drug abstinence agreement with the federal agency where he worked as a contract employee, Applicant demonstrated a pattern of dishonesty and rule violation of a very serious nature. No Guideline E mitigating conditions apply to this conduct. Accordingly, allegations 3.a. and 3.b. of the SOR are concluded against the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Guideline H.: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Guideline E.: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

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Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. The file provided to me in advance of the hearing contained several documents attached to Applicant's Answer to the Statement of Reasons. At the hearing I asked the Parties to review the documents and to explain their status. Department Counsel stated that the documents had been provided to Applicant as a part of the Parties' pre-hearing discovery. Applicant did not request that the materials be admitted into evidence as his exhibits, and he did not submit any other exhibits for admission. Department Counsel submitted five exhibits which were admitted without objection. I removed the documents from my file and did not read or review them in preparing this decision.
4. In his answer to the SOR, Applicant averred that the inhalant he abused was not amyl nitrate but butyl nitrate, which he said was not a controlled substance. Applicant's use of the pharmacological terminology is incorrect, as was the terminology used in the SOR and the earlier agency decisions relied upon by the SOR. The street drugs identified as "poppers" refer to several alkyl esters of nitrous acid. The alkyl esters relevant to this discussion, amyl, butyl, and isobutyl, are always allied with nitrous acid, making them nitrites, not nitrates---which derive from nitric acid. Both nitrates and nitrites are used in medical treatments as vasodilators. Drugs in the nitrate family are not used as recreational drugs but are usually administered in tablet form as heart medication. Nitrite "poppers," on the other hand, are packaged in small glass vials and are sold in liquid form. Throughout this decision, I will use the words amyl and butyl nitrite to refer to the inhalants used by Applicant.
5. Please see Footnote 4.