

DATE: February 12, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-19731

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant falsified a 1999 sworn statement regarding the true extent of his drug use. Adverse inference is not overcome. Clearance is denied.

**STATEMENT OF THE CASE**

On May 24, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) 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 and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on July 10, 2002, and requested a hearing. The case was received by the undersigned on September 9, 2002, and a Notice of Hearing was issued on September 9, 2002.

A hearing was held on October 11, 2002, at which the Government presented five documentary exhibits, and called one witness. Testimony was taken from the Applicant. The transcript was received on October 21, 2002.

**FINDINGS OF FACT**

The Applicant is 30, married and has a high school diploma. He is employed by a defense contractor as a Systems Engineer, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the

SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

*Subparagraph 1.a.* In November 1993, the Applicant sold marijuana to an undercover police officer, who was accompanied by a confidential informant. Based on all of the evidence presented, I believe the confidential informant to have been the girl friend of the Applicant's roommate. According to the contemporaneous police report, the Applicant was a willing seller who told the police officer that the Applicant would sell the officer "a quarter bag for forty-five dollars." (Government Exhibit 5 at 4-5.)

In January 1994, the Applicant was arrested on an unrelated traffic charge and brought into the police. Once there, he was questioned about the above drug sale and eventually admitted it. At that time he agreed to help the police by being a confidential informant. (Government Exhibit 5 at 11-12.)

The Applicant subsequently decided not to be a confidential informant for the police and obtained a lawyer. He was later charged with one count of sale of less than five grams of marijuana, and entered a diversion program. After the completion of the year long program, the charges were dismissed with prejudice on April 18, 1995. (Government Exhibit 4 at 1.)

*Subparagraph 1.b.* This allegation will be discussed in relation to Paragraph 2, below.

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

*Subparagraph 2.a.* This allegation states that the Applicant gave incomplete information about his interaction with the police in 1994 to a Special Agent of the Defense Security Service (DSS) in an April 1999 sworn statement (Government Exhibit 2).

In that statement the Applicant discusses his involvement with the police after his arrest in January 1994, "They [the police] implied they had something on me and wanted me to be a snitch. I couldn't recall doing anything illegal, other than smoking marijuana, and I did not know what to do, so I agreed." (Government Exhibit 2 at 1-2.) At two other points in this statement the Applicant admitted his sale of marijuana. (Government Exhibit 2 at 2-3.) When this particular interview was taken the Government did not have a copy of the police report, or any knowledge of the underlying facts. (Transcript at 28-29.)

The contemporaneous police report states:

I [a particular police officer] told [the Applicant] I wanted to speak to him about some drug sales, [the Applicant] stated he didn't know anything about them. I told [the Applicant] that he had sold some marijuana to an undercover police officer. [The Applicant] stated that he sold marijuana to a white male and described him and the description matched that [of another police officer]. [The Applicant] stated that he did sell him drugs, but only once. [The Applicant] stated that he would do anything to help us out. (Government Exhibit 5 at 11.)

In his Answer to the Statement of Reasons, the Applicant states, "To my recollection, the police never told me that I had sold to an undercover police officer. I asked the police, what was in the folder? Is it the time that I sold marijuana to my roommates's girlfriend and the man paid for it?" (Applicant's Answer to the SOR at 2.)

*Subparagraph 2.b.* The Government alleges in this subparagraph that the Applicant falsified his April 1999 sworn statement with regards to the number of times he used marijuana.

In the Applicant's first statement he described his marijuana use as follows:

I first smoked marijuana in Nov/Dec 90 at a friend's home. He provided the marijuana and three people shared one joint.

I tried it because of a desire to experiment, but it had no effect on me. I next smoked marijuana in late 91, with friends. I felt relaxed, happy, and hungry. During summer 92, I smoked marijuana two or three times and maybe once or twice from summer 92 to Dec 93. In Dec 93 I was arrested for Distribution and changed my lifestyle. The last time I smoked marijuana was Jan 04. (Government Exhibit 2 at 3.)

The Applicant made a second sworn statement in January 2001. Concerning his marijuana use, he stated:

In my previous statement I said I used marijuana approximately 10 times from Nov/Dec 90 to Jan 94. After being questioned again, I recall my use of marijuana as being more frequent than I originally stated. My use of marijuana from 90 to summer 93 was approximately 10 times. From approximately summer 93 until Dec 93, I lived with a roommate that was involved with the sale of drugs. During that time, and because of that environment, I increased my use of marijuana. I do not know exactly how often I smoked marijuana, but recall that it was an average of three to four times a week. I minimized my use because I was concerned that I would not get a clearance if I revealed the entire extent of my use. (Government Exhibit 2 at 1-2.)

The two interviews of the Applicant were conducted by the same Special Agent. Both parties admit that the two interviews, especially the second, was long, loud and confrontational. (Transcript at 42-43, 47-49, 77, 83-84.) The Special Agent testified that she and the Applicant went back and forth during the second interview, which lasted about four hours, as they argued about what should go in the statement. (Transcript at 42-47.) The Applicant testified, "I was thinking about getting out of town and made a bad decision and just signed my name and initialed these statements and not thoroughly reading them." (Transcript at 87. *See, also* Transcript at 91.) He did not state any other reason for the differences between the first statement and the second statement.

The Applicant maintained at the hearing that he had only used marijuana about 10 times. (Transcript at 90, 131-133, 143-144.)

*Subparagraph 2.c.* It is alleged in this subparagraph that the Applicant falsified material facts in his April 1999 statement by understating the facts of the marijuana sale in November 1993.

In his sworn statement (Government Exhibit 2) the Applicant admitted selling some of his roommate's marijuana to his roommate's girlfriend for \$10. The police report concerning the same transaction states that the amount was \$45, the Applicant stated it was his marijuana, he weighed the marijuana out and said he sold it for \$135 an ounce. (Government Exhibit 5 at 4-5.)

When the Applicant was first interviewed, the Government had no information concerning this sale of marijuana, or the Applicant's subsequent arrest. The Applicant brought the incidents to the attention of the DSS investigator and said that his company clerk (he was in the military at the time) had given him incorrect information about how to fill out his Security Clearance Application. (Government Exhibit 3.) The DSS Special Agent subsequently confirmed that the Applicant's version of this event was true. (Transcript at 136-137.) Accordingly, the version of events set forth in Government Exhibit 3 was strictly from the Applicant's memory, as the DSS Special Agent did not have the police report during the first interview. (Transcript at 28-29.)

In my opinion, the differences between the Applicant's first and second statements, on this point alone, are not material. The differences do not, accordingly, amount to a falsification of the first statement concerning the exact circumstances of the marijuana sale. Subparagraph 2.c. is found for the Applicant.

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guidelines. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every

case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline J (Criminal conduct)

Conditions that could raise a security concern:

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

Conditions that could mitigate security concerns:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;
- (6) there is clear evidence of successful rehabilitation.

Guideline E (Personal conduct)

Condition that could raise a security concern:

- (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in criminal conduct and acts of falsification that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

Before going into a discussion of the particular allegations of this case, a word about the credibility of both of the witnesses. It became obvious as the hearing proceeded that the Applicant and the DSS Special Agent who interviewed him twice had, and continue to have, a deep personal animosity for each other. This animosity was such that both parties lost their temper in court on several occasions, the hearing had to be suspended, and the parties admonished about their conduct. In fact, their conduct was so far outside the norm that it was specifically commented on in the record. (Transcript at 151-152.) That being said, after an analysis of the evidence as a whole, I find that the DSS Special Agent's testimony was credible and was not tainted or slanted based on her animosity towards the Applicant.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant intentionally made false material statements to DoD, in violation of a felony criminal statute (Guidelines E and J).

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him, except in part. Paragraph 1 (Guideline J), subparagraph 1.a. is found for the Applicant as the security significance of his drug related arrest has been mitigated by time. Regarding Paragraph 2 (Guideline E): As stated above, Subparagraph 2.c. is found for the Applicant as I have determined that any misstatement by the Applicant in that allegation was not material and, therefore, does not amount to a falsification.

Turning to Subparagraph 2.a., I have carefully considered the circumstances of the interview, as well as the basis of knowledge of both parties. While true that the Applicant could have been more forthcoming about this interview, he twice informed the Government in the statement about his distribution of marijuana and his arrest. In my opinion, this statement does not amount to a falsification. Subparagraph 2.a. is found for the Applicant.

Subparagraph 2.b., however, is very different. In the first two paragraphs of the Applicant's second statement he admits that he intentionally understated his use of drugs in the first statement and gives the total as being much higher. In order to find that this second statement is not true I have to believe all of the following: A. That the Applicant did not make those statements to the DSS Special Agent; B. That the DSS Special Agent either intentionally or unintentionally misheard the Applicant to make the statement; C. That during a four hour interview in which the two of them went back and forth over every line of the statement he did not catch this alleged mistake; and, D. At the end of this contentious interview, during which they did haggle over every fact, the Applicant then quickly signed without reading the statement which was the entire purpose of the exercise. Not only that, but the first two paragraphs of the statement involve the alleged falsification. The chain of circumstance I must believe is simply too great. I find that the Applicant

did falsify his first statement concerning his drug use, told it correctly the second time, and his intent was to deceive the government concerning his drug use. Subparagraph 1.b., Paragraph 1, Subparagraph 2.b. and Paragraph 2 are found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant

Subparagraph 2.a.: For the Applicant.

Subparagraph 2.b.: Against the Applicant.

Subparagraph 2.c.: For 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.

Wilford H. Ross

Administrative Judge