

DATE: June 27, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-20735

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant used marijuana, at times daily, from the 1970s to at least May 2001. 10 U.S.C. 986 applies. The Applicant also falsified a security clearance application and an employment application in March 2000. Adverse inference is not overcome. Clearance is denied.

**STATEMENT OF THE CASE**

On October 5, 2001, 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 October 15, 2001, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on January 4, 2002. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on January 15, 2002, and submitted a response received by DOHA on January 29, 2002. The Department Counsel did not object to the admissibility of the additional material. The case was received by the undersigned on February 12, 2002.

**AMENDMENT OF STATEMENT OF REASONS**

The Department Counsel moved to amend SOR subparagraph 2.c.(2) by changing the year "1994" to the year "1974." This change in the allegation is supported by the evidence in the case, as well as the Applicant's response to the SOR. The Applicant was given notice of the proposed amendment and did not object to it. Accordingly, the Department Counsel's Motion to Amend the Statement of Reasons is granted.

## FINDINGS OF FACT

The Applicant is 49 and single. He is employed by a defense contractor as a pipefitter, and he seeks to retain a Confidential-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 and the exhibits.

Paragraph 1 (Guideline H - Drug abuse). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant began work with his defense contractor employer in 1979 and worked until 1997, when he was laid off. He resumed working with this contractor in 2000. During this entire period the Applicant used marijuana at various frequencies. The Applicant first began using marijuana in the 1970s. In his sworn statement of June 13, 2001, the Applicant described his drug use from the 1970s to October 1997 as follows: "I would smoke marijuana at various frequency ranging from daily in the warmer months when I was socializing more with friends to sometimes only once or twice weekly or a few times a month during the colder months when I was by myself more." (Government Exhibit 7 at 1.) In October 1997, the Applicant was arrested for possession of marijuana in the parking lot at his defense contractor place of employment. In the same signed, sworn statement he goes on to say, "Since my arrest in Oct 97 my use of marijuana has decreased a little to where I only smoke marijuana now a few times a month to relax, mostly when it is offered by friends." (*Ibid.*) In this same statement, the Applicant said that he last used marijuana on May 21, 2001. (*Ibid.* at 1-2.) Finally, regarding his future use of marijuana the Applicant states, "In the future I will keep my use of marijuana to this level and do not think I will increase it because I cannot afford it and I don't want to lose my job." (*Ibid.* at 2.)

The Applicant has submitted written statements which seem to indicate that he has recently stopped using marijuana. He also expresses an intent not to use marijuana in the future. His written statements are not specific in stating when he last used marijuana. He also attempted to downplay his use of marijuana in ay 2001. That explanation is not credible.

In his sworn statement, Government Exhibit 7 at page 2, the Applicant stated that he only purchased about \$1,000 worth of marijuana a year up until 1997. He further states that since October 1997 he has not purchased marijuana because he cannot afford it. In his Response to the FORM, the Applicant describes himself as more of a "moocher" than buying it himself.

The Applicant admits that he intentionally smoked marijuana after enlisting in the US Air Force. This was in an attempt to make himself eligible to be discharged early. He was discharged from the Air Force with a General Discharge Under Honorable Conditions.

The Applicant admits that he had been arrested and convicted of drug related offenses twice in 1973 (subparagraphs 1.e. and 1.f.), twice in the 1980s (subparagraphs 1.g. and 1.i.), and in October 1997 (subparagraph 1.j.). The Applicant denied being arrested for a drug related offense on September 13, 1983 (subparagraph 1.h.). (Government Exhibit 7 at 3.) The Government introduced no evidence to support this particular allegation. Accordingly, subparagraph 1.h. of the SOR is found for the Applicant.

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.

On March 14, 2000, the Applicant completed a job employment application for his defense contractor employer. The Department Counsel did not offer this application into evidence. In the SOR (subparagraph 2.a.), it is alleged that this application asked the Applicant, "Have you ever been convicted . . . by law enforcement authorities for any violation of any law, regulation or ordinance?" The SOR further alleges that the Applicant admitted on this application only his October 1997 arrest for possession of marijuana. The SOR further alleges that the Applicant did not admit the arrests and convictions set forth under subparagraphs 1.e., 1.f., 1.g. and 1.i., above. The SOR further alleges that the Applicant

had five other arrests and convictions, that were not drug related (sub-subparagraphs 2.a.(2), 2.a.(3), 2.a.(5) and 2.a.(6).) (1) Since the Applicant admitted subparagraph 2.a., it is found against him. (Government Exhibit 8 at 3.)

The Applicant further submits that the incidents described in subparagraphs 2.a.(2) and 2.a.(3) occurred when he was a juvenile and should have been off his record. However, it is alleged in subparagraph 2.a. that only those offenses that occurred before the Applicant's 16<sup>th</sup> birthday that were specifically exempted. He was 19 in 1970.

On March 20, 2000, the Applicant completed an official DoD questionnaire in which he stated that he had never been charged with or convicted of a felony. (Government Exhibit 6, question 23.a.) The Government alleges that the Applicant was arrested in September 1970 for Criminal Possession of Stolen Property, a Class E felony. The Applicant admitted this allegation in his Answer to the SOR.

The Applicant also stated on the same DoD questionnaire that he had only been charged or convicted for offenses related to alcohol or drugs once, in October 1997. (Government Exhibit 6, question 22.d.) This statement was a false answer to a relevant question concerning the Applicant's criminal background. In addition to the charges or convictions set forth in subparagraphs 1.e., 1.f., 1.g. and 1.i., the Applicant was arrested and convicted in July 1974 for Driving Under the Influence as set forth in subparagraph 2.c.(2).

On the same questionnaire, the Applicant stated that he had used marijuana one time, in November 1997, during the past seven years. (Government Exhibit 6, question 24.a.) This statement was a false answer to a material question pertaining to the Applicant's former involvement with illegal substances.

Finally, on the same DoD questionnaire, the Applicant stated that he had never used illegal substances while holding a security clearance. (Government Exhibit 6, question 24.b.) This statement was a false answer to a material question pertaining to the Applicant's former involvement with illegal substances.

The Applicant was subsequently interviewed by a Special Agent of the Defense Security Service (DSS) in June 2001. In a signed, sworn statement dated June 13, 2001 (Government Exhibit 7), the Applicant discussed his drug use in detail. He stated that he had falsified his drug information and his arrest record because he was worried he would not get a clearance if he had told the truth. (Government Exhibit 7 at 3, Government Exhibit 8 at 1-2, Government Exhibit 9 at 1-2.) In addition, the Applicant admitted that he had lied on his employment application to his defense contractor employer because he was afraid he would not get rehired if he told the truth. (Government Exhibit 8 at 3.)

Paragraph 3 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

As found above, the Applicant knowingly and willfully provided false material information to DoD during the clearance screening process. In so doing the Applicant violated the felony criminal provisions of 18 U.S.C. 1001.

## **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 criterion. 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 H (Drug involvement)**

Conditions that could raise a security concern:

(2)

- (1) any drug abuse;
- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution;

Conditions that could mitigate security concerns:

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

Guideline E (Personal conduct)

Conditions 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;
- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
- (5) a pattern of dishonesty or rule violations, including the violation of any written or recorded agreement made between the individual and the agency.

Conditions that could mitigate security concerns:

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

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:

(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 acts of drug abuse, falsification and criminal conduct, 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.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has used illegal drugs (Guideline H); and that he 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. Under Paragraph 1 (Guideline H), as set forth above, subparagraph 1.h. is found for the Applicant due to lack of evidence.

Applicant's marijuana use arguably ended less than a year before the record closed. In fact, given the state of the record, I am uncertain as to when exactly the Applicant stopped using marijuana. Accordingly, under the particular circumstances of this case, I must find that 10 U.S.C. 986 applies. Guideline H is found against the Applicant.

The Government relies heavily upon the integrity and honesty of clearance holders, and it is a negative factor for security clearance purposes where an Applicant has deliberately provided false information about material aspects of his or her personal background. In this case, the Applicant gave false answers to his employer as well as to the Government. Guidelines E and J are found against the Applicant.

The Applicant's efforts at reform are noted, and he is commended for his decision to refrain from further drug use. This evidence does not overcome the adverse information that has been presented by the Government. The Applicant may become eligible for a clearance in the future. He is not eligible now.

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, 2 and 3 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.: Against the Applicant.

Subparagraph 1.b.: Against the Applicant.

Subparagraph 1.c.: Against the Applicant.

Subparagraph 1.d.: Against the Applicant.

Subparagraph 1.e.: Against the Applicant.

Subparagraph 1.f.: Against the Applicant.

Subparagraph 1.g.: Against the Applicant.

Subparagraph 1.h.: For the Applicant.

Subparagraph 1.i.: Against the Applicant.

Subparagraph 1.j.: Against the Applicant.

Subparagraph 1.k.: Against the Applicant.

Subparagraph 1.l.: Against the Applicant.

Paragraph 2: 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.

Paragraph 3: Against the Applicant.

Subparagraph 3.a.: Against the Applicant.

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Wilford H. Ross

Administrative Judge

1. Subparagraph 2.a.(4) does not fit within the question asked since that SOR allegation does not state that there was a conviction.
2. Under the provisions of 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.