

DATE: June 18, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-23356

**DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

**APPEARANCES**

**FOR GOVERNMENT**

Rita C. O'Brien, Esq., Department Counsel

**FOR APPLICANT**

Thomas G. Connolly, Esq.

**SYNOPSIS**

Applicant's activity with two foreign national prostitutes in Thailand in 1995 and 1998, and his extra-marital affair with another married, American female, and security clearance holder, reflects questionable judgment making Applicant vulnerable to coercion. The vulnerability issues raised by the prostitutes are reduced because Applicant stopped purchasing sex and understands the level of danger associated with this behavior. Regarding the extra-marital affair, he kept his security manager constantly apprised and has since returned to his wife. However, while the alcohol consumption is mitigated, Applicant's intentional falsifications of his past drug use are not because they are misleading and inconsistent in scope and frequency. Clearance is denied.

**RULINGS ON PROCEDURE**

The government exhibits will be marked "GE" followed by the number of the exhibit. Applicant's exhibits will be marked "AE" followed by the letter of the exhibit. Transcript references will contain "Tr." followed by the page number.

**FINDINGS OF FACT**

The SOR alleges personal conduct (Guideline E), sexual behavior (Guideline D), and alcohol consumption (Guideline G). Applicant admitted subparagraphs 1.a. and 1.b. His denial of 1.c. was based on his disagreement over the claimed misleading language used to describe his driving record. Applicant denied 1.d., 1.e., and 1.f., strenuously defending the accuracy of his drug history in the March 6, 2001, sworn statement. (GE 4).

Regarding paragraph 2.a., Applicant admitted his affair with another United States (US) citizen during his employment in a foreign country in 1999 and 2000. Although his Answer reflects no response to his sexual behavior in 1995 and 1998, Applicant admitted in his testimony his sexual encounters with two foreign national women (1.b.) during the two periods cited in the SOR. (Tr. 142)

In response to paragraph 3, Applicant admitted he still consumed alcohol but in moderation. He stated he may drink too

much now and then, but he retains enough sense to know not to drive. Applicant's admissions shall be incorporated in the following factual findings.

Applicant is 40 years old and requests a top secret clearance. Applicant has been employed as a shielding specialist for his present employer since 1996.

Personal Conduct; Sexual Behavior: While Applicant was working in Russia between the end of 1999 and the summer of 2000, he had an affair with another married US citizen (1.a.) who was the chief of quality control of another contractor. (GE 162-165) During various stages of the relationship, Applicant advised his security officer (Tr. 51), the president of the company Applicant worked for (Tr. 48), and the Special Agent of the Diplomatic Security Service, about the nature and scope of the affair. <sup>(1)</sup> (Tr. 139, 140, 165) Applicant also told his wife about the female who was accompanying him to cultural events. (Tr. 164)

In 1995 and 1998, Applicant had six sexual encounters in Thailand (1.b.) with two foreign nationals employed as prostitutes. (Tr. 142; GE 4) Applicant did not believe there was a need to tell the Department of State in 1995, his wife, or his employer in 1998 about these encounters (Tr. 183), because he was told foreign nationals from Thailand did not present the same threat as foreign nationals from Vietnam. (Tr. 186) <sup>(2)</sup> Applicant now realizes the vulnerability problems associated with this behavior. (Tr. 186)

Between 1977 and 1996, Applicant was cited at least eight times in two jurisdictions for motor vehicle violations, including reckless driving, negligent driving, or speeding, resulting in Applicant's license being suspended approximately five times. <sup>(3)</sup> Also, Applicant failed to appear in court five times. (Tr. 151) Applicant believes his driving record has improved along with everything else in his life because he has become more mature. (Tr. 145)

In a signed sworn statement (GE 4) dated March 6, 2001 (subparagraph 1.d., 1.e., 1.f.) Applicant intentionally provided false information about his drug use since 1971. My finding is based on the inconsistent and misleading information Applicant provided during various periods of the security investigation. <sup>(4)</sup>

Also in GE 4, Applicant claimed the only drugs he "briefly" used were marijuana, LSD and cocaine, and, "I have not used any illegal substance except the ones I just mentioned."

Applicant denied he used heroin (1.d.), claiming he never used drugs requiring him to puncture his skin. (Tr. 137;153) Though the reason for his denial of heroin use is persuasive, Applicant acknowledged his drug use occurred during the "wild years" in high school. (Tr. 132) His claim of not recalling what he did during the "wild years" should be carefully weighed against the drug disclosures in GE 13 and the other documentary exhibits identifying additional drugs not listed in GE 13.

Because GE 13 contradicts GE 2 and Applicant's testimony regarding his heroin use, I must determine which source is more credible. The weight to be given GE 13 depends on its intrinsic reliability and consistency with any other evidence of record. GE 13 (ROI) is not a signed sworn statement but rather a hearsay report of a 90 minute discussion with the Applicant, and represents the Special Agent's recollection of what was discussed. The subject matter of the ROI covers drug involvement and alcohol consumption, which are two of the guidelines addressed in the SOR. Applicant's former address listed in GE 13 can be independently verified in GE 2. There are motor vehicle offenses identified in GE 13 that are corroborated in GE 10, GE 12, and AE K. At page 170 of the transcript, Applicant verified the drinking frequency reflected in GE 13. Finally, considering the evidentiary consistency between GE 13 and other extrinsic pieces of evidence cited above (except for GE 2 and Applicant's testimony), and the absence of any evidence suggesting interest or bias by the Special Agent in generating the exhibit, I find GE 13 credible concerning drugs Applicant in the ten year period.

On the other hand, Applicant's sworn statement (March 2001) and his testimony he never used heroin must be weighed against his interest in the outcome of this proceeding, along with other misleading and inconsistent information he provided regarding his other drug use. Even though Applicant originally admitted using amphetamines in GE 13 (July 1986), there is no mention of amphetamine use in subsequent official documents, including his March 6, 2001, sworn statement (GE 4), where he stated the only drugs he used were marijuana, LSD and cocaine. Applicant even denied

using amphetamines in his response to the SOR. However, at the hearing, Applicant admitted he used amphetamines, "...even though it couldn't have been more than a few times." (Tr. 154)

In the remarks section of GE 2 (August 1992), Applicant noted he used hashish on three occasions. His hashish use is not mentioned in GE 13 or GE 4. While Applicant claims in his answer to the SOR he believed hashish was a derivative of marijuana, and that he mentioned hashish in an earlier official form, there is no independent evidence substantiating his claim that he mentioned hashish separately in any other security form besides GE 2. Considering the evidence as a whole, including Applicant's demeanor at the hearing, I find Applicant intentionally falsified his responses to the March 6, 2001, sworn statement, as alleged in SOR subparagraphs 1.d., 1.e., and 1.f.

Alcohol Involvement: Applicant began using alcohol in high school, and, he was involved in an alcohol-related driving incident in 1978 and one in 1984. (Tr. 170; GE 13) In July 1986, while Applicant indicated he was drinking only about one beer a day with three or four beers on the weekend (GE 13), the counseling records reflect Applicant's belief in April 1985 he had a moderate drinking problem coupled with a desire to control his drinking. (GE 11) While his sworn statement, dated March 6, 2001 (the same statement Applicant vigorously defended in his response to the SOR regarding his drug use), indicated Applicant was drinking four or five times a week, and drinking to legal intoxication once or twice a week, Applicant disagreed with the misleading character of the statement. (Tr. 172) Although the language does not appear anywhere in the statement, Applicant claims he repeatedly tried to get the Special Agent (who prepared the sworn statement for his signature) to understand Applicant would go weeks without drinking at all. Applicant also claims the Special Agent told him what to write regarding his alcohol consumption. (Tr. 191) Applicant was asked about the initials appearing at various locations of his March 6, 2001, sworn statement GE 4. (Tr. 191) Applicant understood the initials to mean he agreed with the paragraph. However, the sworn statement is phrased in terms of year around use which he did not agree with. Applicant claims he goes weeks without drinking at the present time. (Tr. 180)

Character evidence: Applicant submitted 12 character exhibits (AE A through AE L) which shall be discussed. The Supervisory Special Agent since 1986 (AE A), with a concentration in counterintelligence between 1997 and 2000, met Applicant some time in 1998 or 1999. The Supervisory Agent considered Applicant to be honest and candid. Applicant volunteered information about an extra-marital contact to the Agent without solicitation. The Supervisory Agent determined Applicant's relationship with another Top Secret American female presented no security risk. The Supervisory Special Agent determined Applicant complied with all security requirements of the Russia project, and should continue to work on classified programs because of his integrity and honor.

In AE C, the group leader responsible for telecommunications for the Department of State's Overseas Building Operations, has known Applicant professionally and socially since 1992. According to the group leader, Applicant takes pride in his work and does not drink to excess after work.

In AE D, an engineering technician for the Department of State (DOS), has known Applicant professionally since 1993. In inspecting Applicant's work over the years, the engineering technician has always found Applicant's products exemplify excellent workmanship. The technician has always found Applicant exercising good judgment and reliability in the execution of all assignments.

AE E is a reference from facility security officer (FSO) of Applicant's employer, who is responsible for preparing and presenting security briefings, including those mandated by DSS. The FSO has found Applicant to be security conscious, employing extra security measures whenever he feels they are appropriate. The FSO has no reason to believe Applicant has ever used drugs, and has never lacked control over his consumption of alcohol. The FSO recalled Applicant voluntarily disclosed his extramarital affair. A DOS inquiry into the relationship found no reason for concern; in addition, the relationship had no impact on Applicant's work.

The president of a company that works with Applicant's company wrote in AE F that he has known Applicant for 12 years. The president trusts and respects Applicant because of his remarkable strength in installing projects.

The owner of a testing company has known Applicant since 1992 and has never seen his social activities interfere with his work. The tester could not think of any reason to question Applicant's honesty and reliability.

A congratulatory letter (AE H) was submitted to Applicant's employer in February 2001, thanking Applicant for his assistance in completing a shielding project.

AE J is a copy of Applicant's driving record. AE K reflects Applicant's points Applicant lodged against Applicant's driving record between 1977 and the end of 2002 for the state identified in AE J. AE L shows approximate dates when Applicant disclosed information about past drug use, what the use was, and what classified projects he was working on at the time.

The president of Applicant's employer testified he hired Applicant in 1993. The president has found Applicant to be punctual, honest, and very professional. Though he was aware of Applicant's relationship in Russia and his intentions to divorce his wife (Tr. 49), the president was not concerned about vulnerability issues. (Tr. 49) The president was also aware Applicant was having personality problems with two or three disgruntled employees. Though the adverse information report (GE 7) informed that Applicant was getting intoxicated while in Russia during 1999, the president did not believe the report because the sources of the report were two of the disgruntled employees who were terminated. (Tr. 58)

The director of operations oversees all operations around the world. The director, who has known Applicant since 1995, has found Applicant to be honest even though it may be against his own interest. (Tr. 67) The director has never seen Applicant drink to the point where he loses control. (Tr. 68) The director has never seen Applicant drive irresponsibly. (Tr. 69)

An overseas building operator for the last 11 years has worked with Applicant on about 10 projects. The operator has always found Applicant to be hard-working, honest, and professional employee, who is also security conscious. The operator recalled Applicant spoke to him about the affair Applicant was involved in 1999. (Tr. 101)

Having weighed the character evidence, there is considerable evidence Applicant's honesty, his security consciousness, and professionalism. There is some evidence regarding Applicant's alcohol use and the general position from witnesses and character references he never drank to the point where he lost control.

## **POLICIES**

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

### **Personal Conduct**

Disqualifying Conditions:

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator...in connection with a personnel or trustworthiness determination;
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 rules violations, including a violation of any written or recorded agreement between the individual and the agency.

Mitigating Conditions:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

### **Sexual Behavior**

#### Disqualifying Conditions:

4. Sexual behavior of a public nature and/or that which reflects lack of discretion and judgment.

#### Mitigating Conditions:

2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.
4. The behavior no longer serves as a basis for coercion, exploitation, or duress.

### **Alcohol Consumption**

#### Disqualifying conditions:

1. Alcohol-related incidents away from work;
5. Habitual or binge consumption of alcohol.

#### Mitigating Conditions:

1. The alcohol-related incidents do not indicate a pattern;
2. The problem occurred a number of years ago and there is no indication of a recent problem;

### **General Policy Factors (Whole Person Concept)**

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 16 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and, (9) the likelihood of continuation or recurrence.

### **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under personal conduct (Guideline E), sexual behavior (Guideline D), and alcohol consumption (Guideline G), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational

connection, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

### CONCLUSIONS

Personal conduct is defined as behavior that involves poor judgment, untrustworthiness, dishonesty, or unwillingness to comply with rules and regulations. Applicant's extra-marital affair with a female in Russia in 1999 and 2000 reflects questionable judgment within the scope of the fourth disqualifying condition (DC) of the personal conduct guideline. Even though Applicant's lover was also an American citizen with a security clearance, both Applicant and his lover were married at the time, and even though he had intended to divorce his wife, there had been no official action in that direction during the period of the extra-marital activity. However, there is sufficient evidence in the record (including the evidence of Applicant's overall security consciousness) demonstrating Applicant complied with the security rules by advising the appropriate officials at various stages of the affair. I conclude that the ongoing notice satisfies Applicant's ultimate burden of persuasion under the fifth mitigating condition (MC) of the personal conduct guideline.

Appellant's sexual activity with prostitutes on about six occasions in 1995 and 1998 raises more egregious behavior under DC 4 of the personal conduct guideline. Applicant even conceded he could have become a target because of this risky behavior. Applicant's extra-marital sex with prostitutes is compounded by Applicant's failure to advise the appropriate security officials. However, I am reasonably satisfied Applicant comprehends the stupidity of his behavior in 1995 and 1998, and will refrain from this kind of behavior in the future. Given the independent evidence supporting Applicant's vigilance in security matters, I find for Applicant under 1.b. of the SOR.

The sexual conduct described in 1.a. and 1.b. of the SOR is also a security concern under guideline D because it makes the individual a target for duress or reflects a lack of judgment or discretion. Applicant's +sexual behavior with prostitutes in 1995 and 1998, and his extra-marital affair in 1999 and 2000, fall within the DC 2 by making him a target for exploitation or blackmail (DC 3), while also exhibiting a lack of judgment. (DC 4) However, as indicated under MC 5 under the personal conduct guideline, I am satisfied Applicant now understands the potential dire consequences of his extra-marital activity

DC 5 under the personal conduct guideline refers to a pattern of dishonesty or rule violations, including violation of any written agreement made between the individual and agency. Receiving at least eight substantive traffic citations, nine license suspensions, and five citations for failure to appear, within a 19-year-period, constitutes a pattern of traffic violations and related conduct demonstrating a lack of respect for the traffic laws.

The personal conduct guideline also addresses dishonest conduct. Applicant's intentional falsification of subparagraphs 1.d., 1.e., and 1.f. (GE 4) falls within DC 3 as Applicant deliberately provided false or misleading information about material matters (drug use) to an investigator in connection with security clearance determination. Though it seems GE 13 may be the complete account of this drug use, Applicant distinguished between marijuana and hashish in his security form in August 1992, and also reduced his marijuana use by five years. (GE 2) However, by GE 4 (March 2001), Applicant provided a different account of his drug use which did not mention hashish, but did mention cocaine use.

The first three mitigating conditions under the personal conduct guideline are potentially applicable to this case. DC 1 applies where the information is unsubstantiated or not pertinent to a determination of judgment. DC 1 must be removed from consideration because a person's past drug use is always pertinent to judgment and other security clearance qualifications.

MC 2 may apply when the falsification was an isolated event and the individual has subsequently provided the information voluntarily. MC 2 is unavailable for mitigation on these facts as Applicant continues to deny he used heroin and barbiturates. MC 3 may be utilized to mitigate when the individual makes prompt good-faith efforts to correct the falsification before being confronted with the facts. MC 3 must be removed from consideration for the same reasons MC 2 was eliminated. Applicant has yet to admit the full scope and frequency of his drug use between 1971 and 1981. In sum, Applicant has failed to overcome his intentional falsifications concerning his past drug use. The character evidence

of Appellant's honesty and professionalism on the job is insufficient to overcome the negative evidence under DC 3 of the personal conduct guideline.

Excessive alcohol consumption can lead to questionable judgment that is demonstrated in acts of unreliability or irresponsibility, and eventually security violations. Applicant's alcohol consumption resulted in a driving while intoxicated (DWI) citation and conviction<sup>(5)</sup> in 1984 (3.b.), followed by his required attendance at alcohol-related counseling for three months between January and April 1985. In March 2001, Applicant was drinking about three to four mixed drinks four to five times a week, and was becoming intoxicated once or twice a week. Applicant's frequency of alcohol use in March 2001 satisfies DC 5 of the alcohol consumption guideline.

Applicant's alcohol-related incidents do not indicate a pattern because there has no alcohol-related behavior since 1984. (MC 1) MC 2 recognizes the passage of time without indication of a current problem. The absence of alcohol-related conduct since 1984 should be interpreted as evidence of a modification in behavior by Applicant to abstain from driving while under the influence of alcohol. While Applicant continues to consume alcohol, there is no prohibition under the Directive he must stop drinking. I find for Applicant under the alcohol consumption guideline.

In reaching my findings against Applicant under the personal conduct guideline and for the Applicant under the sexual behavior and alcohol consumption guidelines I have also carefully reviewed Applicant's conduct under the general factors of the whole person concept.

Because there are no corresponding mitigating conditions for DC 5 (rule violations) of the personal conduct guideline, the whole concept factors must be addressed to determine whether Applicant has met his ultimate burden of persuasion. Though there is an abundance of evidence under DC 5, not only showing moving violations, but also an indifference to resolving the violations, the record shows no alcohol-related violations since 1984, and no traffic violations since 1996. The seven year period provides sufficient evidence leading me to believe Applicant will not become entangled in this type of conduct in future.

### **FORMAL FINDINGS**

Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (personal conduct): AGAINST THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.
- f. Against the Applicant.

Paragraph 2 (sexual behavior): FOR THE APPLICANT.

- a. For the Applicant.

Paragraph 3 (alcohol consumption): FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- 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 Applicant.

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Paul J. Mason

Administrative Judge

1. According to the Special Agent, since the relationship was with another American with a top secret clearance rather than a foreign national, there was no counterintelligence issues and did not fall within counterintelligence reporting requirements. (AE B)
2. Applicant acknowledged the possibility of exploitation or exposure to duress because neither his employer, nor the Department of State, nor his wife did not know about these liaisons. (Tr. 186)
3. The motor vehicle violations totaled 27 points between 1977 and 1996. (Tr. 150)
4. Applicant's purported drug history was included in a ROI prepared by a Special Agent in July 1986 based on a 90 minute interview, and is identified as GE 13. Applicant also signed a sworn statement based on the interview. (GE 6) The ROI reflects Applicant used marijuana at different frequencies from 1971 to 1981; he used amphetamines twice a year from 1975 to 1979; he used barbiturates twice in 1971 and 1972; he used heroin six times in 1975. Yet, in August 1992 (GE 2), Applicant indicated in a security form he had used only three drugs, including hashish three times in 1976, LSD once in 1977, and marijuana many times between 1975 and 1980. However, in the sworn statement, dated March 6, 2001 (GE 4, subparagraph 1.d., 1.e., and 1.f.), Applicant claimed the only drugs briefly used were cannabis, LSD, and cocaine, with cocaine use occurring only once in 1980. (Tr. 150)
5. DC 1 is alcohol-related incidents away from work, such as driving while under the influence....