

DATE: May 13, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-26640

## **DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant developed a severe medical condition in her teen years in the 1970s, which required prescribed pain medication on a regular basis until 1994 or 1995. After experimenting with a certain type of prescribed, pain medication in 1995, Applicant began to abuse pain medication in late 1995. Although Applicant has never provided a full account of her abuse of pain killers, she admitted addiction to pain killers in 1998 and 1999, and violation of the criminal law in 1998 and 1999. Applicant's case in rehabilitation under criminal conduct and drug involvement is undermined by (1) her sworn statement in November 2001, demonstrating a continuing denial of her culpability for the prescription forgery in November 1999, and (2) the lack of other current, independent evidence indicating she will not resort to drug abuse or criminal conduct in the future. On the other hand, using the reasonable person standard, I do not find Applicant intentionally falsified her security questionnaire or her sworn statement. Clearance is denied.

### **STATEMENT OF CASE**

On October 9, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, amended April 4, 1999, issued a Statement of Reasons (SOR) to 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 Applicant, and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. Applicant filed her Answer to the SOR on November 11, 2002. Applicant elected to have her case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on January 29, 2003. Applicant received the FORM on March 11, 2003. She provided her response on March 11, 2003. The case was received by the undersigned for decision on April 21, 2003.

### **RULINGS ON PROCEDURE**

Pursuant to E3.1.17., Enclosure 3 of the Directive, Paragraph 3.a. shall be amended by changing the word "no " (in the

second line of the allegation) to "yes," to conform the SOR to the evidence.

## FINDINGS OF FACT

The SOR alleges criminal conduct, drug involvement, and personal conduct. Applicant admitted all the factual allegations except for subparagraph 3.a. and 3.b. Regarding her denial of 3.a., Applicant does not believe she falsified her answer to question 24 because she interpreted the question to apply only to whether she had ever been arrested for street drugs such as cocaine and heroin. She also thought "STET" indicated the case was removed from the record. While Applicant used the words "I admit" in response to 3.b., she really did not think she falsely answered that allegation either, because she viewed the 1998 offense removed from her record.

Applicant is 53 years old and employed as an administrative assistant with a defense contractor. She seeks a secret clearance.

### Criminal Conduct

On November 5, 1999, Applicant was arrested and charged with a Class 6 felony; Prescription Fraud. (subparagraph 1.a.) On March 9, 2000, the General District Court found Applicant guilty of the reduced charge of Possession of Controlled Paraphernalia. Applicant's sentence of 12 months in jail was suspended. She was placed on two years probation with substance abuse counseling required. According to Applicant's sworn statement (Item 5), Applicant was still having difficulty understanding the seriousness of her drug problem in November 2001.

On May 19, 1998, Applicant was arrested for Prescription Forgery. Applicant received deferred adjudication for this offense conditioned on her continued substance abuse counseling.

On July 30, 1998, Appellant's doctor noted Applicant had surgery on July 25, 1995 because of pain associated with lesions in the pelvic area.

On September 2, 1998, the court was advised by status report that Applicant attended nine group therapy sessions (treatment required under subparagraph 1.b.) and was referred to her primary care physician for medication management. The court was also notified on September 2, 1998, that Applicant had been in individual treatment with a licensed clinical social worker since June 15, 1998. Missing from both criminal case files is information indicating whether Applicant completed all conditions of her sentence, specifically her treatment conditions.

### Drug Involvement

Applicant provided some information regarding her drug use over the years. Applicant described female problems that required her to have eight abdominal surgeries between 1972 and 1995. She became dependent on pain killers.<sup>(1)</sup> After trying another mode of treatment she returned to pain killers. She admitted she was a desperate person for a few months in 1998 and 1999. Applicant has provided no evidence of her pain killer use since she resumed pain killer use in the late 1990s.

As a result of her Prescription Drug Fraud in November 1999, she was required to attend counseling. Although she claims she completed all court conditions, she has provided no proof to indicate all court-ordered conditions were fulfilled. Furthermore, she has provided no evidence of the current state of her pain killer use.

While Applicant claims she completed all court conditions imposed following her the May 1998 arrest for Prescription Forgery, the evidence of ongoing treatment does not show she completed court-ordered treatment. As noted in the preceding paragraph, Applicant has presented no current evidence about her drug use.

### Personal Conduct

On August 16, 2001, when Applicant was age 52 (subparagraph 3.a.), she correctly answered "yes" to question 24 (Item 4) and did furnish information regarding her May 1999 arrest for Prescription Fraud, but not her May 1998 arrest for Prescription Forgery. In explanation of her "YES" response to question 24, Applicant indicated she thought the question

was directed to those individuals who used street drugs such as heroin, crack or cocaine, or alcohol. Had Applicant really believed the question applied to those drug users only, there would have been no reason to include the November 1999 criminal charge in response to question 24. Therefore, Applicant's first explanation does not explain why she listed the November 1999 drug offense and did not list the second offense.

Applicant's second explanation is that she believed the "STET" status of the 1998 case, "meant temporary pending completion of the court order, then stricken from the record after all requirements are fulfilled." (Applicant's response to the SOR.) Even though Applicant was 52-years-old when she filled out her security form in August 2001, the record contains no evidence to suggest she should have been familiar with specific legal terms to understand her responsibility to disclose information about her 1998 arrest. (2) Having weighed all the evidence on this issue, I find for Applicant under 3.a.

On November 20, 2001 (subparagraph 3.b.), Applicant disclosed information about her 1999 Prescription Fraud, but again provided no information about her 1998 Prescription Forgery. Though I also find for Applicant under 3.b. based on her belief the 1998 offense had been removed from her record, I cannot overlook her description of the 1999 offense (Item 5), where she claims she was only trying to fill a prescription for a friend. Her denial of the 1999 offense which she pled guilty to, demonstrates Applicant has had problems reconciling her criminal behavior as recently as November 2001, almost two years after she attempted to fill a forged prescription.

In addition to her treatment records, Applicant submitted a character statement dated August 31, 1998, from her aunt. In the statement, the aunt recalled Applicant had her first surgery in the affected area in 1972. Because the pain in the affected area started while Applicant was young, Applicant had to increase the medication strength as her pain increased over the years. The aunt praised Applicant's accomplishments as a mother and wife even with her medical problems. The aunt noted Applicant's treatment and her will to defeat her medical problem would help her immensely.

Applicant's husband wrote a letter describing Applicant's medical condition. For 18 years, he observed his wife in continual pain. He indicated, "and it seems she is always taking medication to relieve pain or elevate a continuing ailment." Her husband believed her addiction led her to seek medication for pain. Finally, her husband vouched for her regular attendance in counseling or meetings with her substance abuse counselor.

On August 27, 1998, Applicant's coworker described Applicant as a hard worker and family person who spends a lot of time and attention on her son.

In a letter from the branch chief, Department of State, advised that April to June 1998 is a very busy time of the year for his office. From the chief's vantage point, Applicant performed all tasks competently, and helped other departments on occasion.

In June 2001, Applicant received a certificate of appreciation for her work. On August 17, 2000, Applicant was certified for completing a three hour introductory course for project review managers. On August 18, 2000, Applicant was awarded a certificate for completing the cable end-user program. On April 14, 1999, Applicant was officially acknowledged for her commitment to excellence in administrative support and customer service. In August 1998, Applicant received a certificate of recognition for her support to mission assignments during the aftermath of an international conflict.

Applicant received a certificate for outstanding job performance in June 2001.

Applicant claimed in her response to the FORM, she was not in denial. However, Applicant did not explain why she was not in denial. As noted earlier in the section, Applicant provided no current evidence on the status of her use of pain drugs.

### **POLICIES**

Enclosure 2, page 16 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:

### **Criminal Conduct**

Disqualifying Conditions:

2. A single serious crime or multiple lesser offenses.

Mitigating Conditions:

1. The criminal behavior was not recent;
2. The criminal behavior was an isolated incident;
3. There is clear evidence of successful rehabilitation.

### **Drug Involvement**

Disqualifying Conditions:

1. Any drug abuse;
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.
4. Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized treatment program.

Mitigating Conditions:

1. The drug involvement was not recent;
2. The drug involvement was an isolated or aberrational event;
3. A demonstrated intent not to abuse any drugs in the future.

### **Personal Conduct**

Disqualifying Conditions:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...[to] determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
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;

Mitigating Conditions:

None.

### **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 pages 16 and 17 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; and, (8) The potential for pressure, coercion, exploitation, or duress; (9) and, 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 Guideline H (drug involvement), Guideline J (criminal conduct), and Guideline E (personal conduct) 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**

#### Criminal Conduct

Criminal conduct is defined as a history or pattern of criminal activity which creates doubt about an individual's judgment, reliability, and trustworthiness. The ay 1998 criminal conduct of Prescription Forgery was very serious as Applicant fraudulently attempted to obtain prescribed pain killers for her own use. In November 1999, Applicant committed Prescription Fraud by trying to fill a forged prescription. Both offenses fall into the scope of the second disqualifying condition (DC) <sup>(3)</sup> of the criminal conduct guideline. Both offenses clearly demonstrate Appellant's willingness to violate the law to obtain pain medication.

As noted in Policies, once the Government has established a case under the guidelines of the Directive, Applicant has the ultimate burden of persuasion through explanation, rehabilitation, and extenuation to prove it is clearly consistent with the national interest to grant or continue a security clearance. There are five mitigating conditions (MC) under the criminal conduct guideline that may apply to the circumstances of this case. MC 1 <sup>(4)</sup> is applicable in this case because the most recent criminal conduct occurred in November 1999, four years ago. However, in her sworn statement in November 2001, Applicant acknowledged her arrest and sentence for a lesser included offense, but claimed she was only picking up medication for a friend. Applicant's denial of the crime more than two years after she was sentenced, and the lack of evidence in rehabilitation since that time, raise lingering doubts about whether she currently comprehends the complete scope and nature of her criminal conduct in November 1999.

If the crime was an isolated incident, MC 2 <sup>(5)</sup> under criminal conduct should be weighed. Since the most recent offense occurred in November 1999, MC 2 should be considered but only on a limited basis. Before her involvement in the November 1999 crime, Applicant also committed the May 1998 offense. In addition, Applicant admitted her abuse of pain killers began in late 1995 after her last surgery. Between 1995 and May 1998, while Applicant may not have been forging prescriptions to obtain pain killing drugs, she was still abusing pain killers.

MC 4<sup>(6)</sup> under the criminal conduct guideline may apply when there is evidence which shows the criminal acts occurred involuntarily. Although the evidence suggests the prescription fraud was involuntarily committed because of Appellant's addiction during the latter 1990s, there is insufficient evidence since that time to confidently conclude Applicant's drug dependence is unlikely to recur.

MC 6<sup>(7)</sup> under the criminal conduct guideline refers to clear evidence of successful rehabilitation. Clear evidence of rehabilitation starts with evidence indicating Applicant has not violated the law. Because of Applicant's drug dependence in the latter 1990s, it stands to reason that Applicant should also present updated evidence which describes what her use of pain killers has been since 1999. The only evidence Applicant has proffered is in her response to the FORM where she indicated she is no longer in denial. Without current evidence, I am unable to provide Applicant more than limited mitigation under MC 6. In sum, Applicant's meager evidence in mitigation and rehabilitation is insufficient to satisfactorily rebut the Government's case under Guideline J (criminal conduct).

### Drug Involvement

Drug abuse or dependence may impair an individual's social or occupational functioning, which may increase the risk of security violations. Based on Applicant's use of an illegal drug contrary to medical direction,<sup>(8)</sup> DC 1<sup>(9)</sup> and DC 2<sup>(10)</sup> should be applied. For many years Applicant was using the pain killers legally but began abusing the prescription drugs in 1995 after her last surgery. Her dependence on the drugs became so intense she forged prescriptions on two occasions in 1998 and 1999.

Because of Applicant's history of drug dependence, she has the burden of presenting evidence in mitigation, rehabilitation, or explanation, which demonstrates the unlikelihood of a recurrence of drug dependence in the future. Even though the record is silent regarding Applicant's current drug use, I cannot automatically assume Applicant is no longer abusing pain killers. Without any current evidence on her drug use, MC 1<sup>(11)</sup> must be removed from consideration.

Neither MC 2<sup>(12)</sup> or MC 3<sup>(13)</sup> is available for mitigation because there is no evidence regarding Applicant's present use of drugs. As discussed under the criminal conduct guideline, without evidence of current pain killer use (or non-use of pain killers), Applicant has failed to persuade me MC 2 and MC 3 should be applied to overcome her drug involvement since 1995.

### Personal Conduct

Applicant clearly omitted her 1998 criminal conduct from her security form in August 2001 and her sworn statement in November 2001. Although she was over 50 when she filled out the security form, there is insufficient evidence (utilizing the reasonable person standard) for me to conclude she should have included the 1998 offense on the security form and in her sworn statement. Hence, the absence of intent to falsify makes DC 2<sup>(14)</sup> and DC 3<sup>(15)</sup> of the personal conduct guideline inapplicable to the circumstances of this case.

In reaching my decision under each guideline, I have considered the treatment evidence of 1998 and 1999, along with Applicant's citations and certificates of appreciation. My decision against Applicant under the criminal conduct and drug involvement guidelines, and for Applicant under the personal conduct guideline, has also included an examination of the evidence under the general factors of the whole person concept.

### **FORMAL FINDINGS**

Formal Findings required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are:

Paragraph 1 (criminal conduct): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

Paragraph 2 (drug involvement): AGAINST THE APPLICANT.

A. Against the Applicant.

b. Against the Applicant.

Paragraph 3 (personal conduct): FOR THE APPLICANT.

a. For the Applicant.

b. 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 Applicant a security clearance.

Paul J. Mason

Administrative Judge

1. One of the drugs mentioned in Item 7 (court records) is hydrocodone (a narcotic analgesic)
2. There is no evidence to intimate Applicant was aware of the term "STET" before her sentencing in September 1998.
3. A single serious crime or multiple lesser offenses.
4. The criminal behavior was not recent.
5. The crime was an isolated event.
6. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
7. There is clear evidence of successful rehabilitation.
8. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.
9. Any drug abuse.
10. Illegal drug possession, including cultivation, processing , manufacture, purchase, sale, or distribution.
11. The drug involvement was not recent.
12. The drug involvement was isolated or an aberrational event.
13. A demonstrated intent not to abuse any drugs in the future.
14. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...used to determine security clearance eligibility....
15. Deliberately providing false or misleading information concerning relevant and material matters to an investigator...in connection with a personnel security [clearance].