

DATE: December 3, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-00790

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

From the 1980s to July 1995, Applicant was a drug addict who daily used cocaine and heroin. His illegal drug use resulted in numerous arrests. His last use occurred prior to his July 1995 arrest. In 1998, he failed to reveal he had used any illegal drugs when he completed his security clearance application (SF 86). His criminal conduct related to illegal drug use has been mitigated by the passage of time. However, he has failed to mitigate the negative security implications stemming from the falsification of his SF 86. Clearance is denied.

**STATEMENT OF THE CASE**

On December 4, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 23, 2004, Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing.

On January 23, 2004, the Applicant received a complete copy of the file of relevant material (FORM) dated April 7, 2004, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. In the FORM, Department Counsel presented 15 exhibits (Gov. Ex.). Applicant's response to the FORM was due on May 22, 2004. No response has been received and no exhibits were presented by Applicant. I was assigned the case on July 8, 2004. A moratorium was subsequently placed on all cases involving Title 10 U.S.C. § 986 in which an applicant was sentenced to more than one year of incarceration, but did not actually serve at least one year in jail. The moratorium ended November 1, 2004.

**FINDINGS OF FACT**

The SOR alleges Criminal Conduct and Personal Conduct. The Applicant admits to the following: in 1989, being charged with possession of marijuana, sentenced to 16 months incarceration and served 10 to 11 months. In 1995, being

arrested and convicted of use or being under the influence of a controlled substance. He was sentenced to time served, which was July 1995 to October 1995. He admits answering "no" to question 27, which asked him about his illegal drug use during the previous seven years when he completed his security clearance application, Standard Form (SF) 86 in 1998. From the 1980s until July 1995, he used cocaine and heroin daily. These admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

The Applicant is 50 years old, has worked for a defense contractor since May 1998, and is seeking to obtain a security clearance.

In April 1973, Applicant, while in the Army, used and possessed marijuana. (Gov Ex 9) In the early 1980s, Applicant began to use alcohol and illegal drugs, to include marijuana and cocaine. In the late 1980s he began to use heroin. For many years, Applicant was a drug addict, using cocaine and heroin daily from the 1980's until July 1995. In the past, his illegal drug use has resulted in him being homeless. The only times he did not use illegal drugs was when he was incarcerated. He has been drug free since 1995.

Applicant's FBI identification record (Gov Ex 8) lists 19 arrests. In 1981, Applicant was convicted of possession of marijuana and was incarceration in jail for one month. In 1982, he was convicted of theft of government property and sentenced to 90 days confinement. He violated his probation and was sentenced to nine months confinement. In April 1993, Applicant was convicted and sentenced to one year imprisonment (suspended) plus 150 hours of community service. (Gov Ex 11) In 1985, he was convicted of Driving Under the Influence (DUI). In 1988, he was arrested for being under the influence of a controlled substance (cocaine). He served 90 days in jail. In 1989, when he transferred to the county jail, it was discovered he had marijuana in his mouth. An additional 120 days was added to his sentence. (Gov Ex 15) In 1993, he was arrested for possession of illegal drugs and being under the influence of a controlled substance. In February 1995, he was arrested for being under the influence of heroin.

In July 1995, Applicant was arrested for being under the influence of a controlled substance. He was sentenced to time served. In his December 2000 sworn statement (Gov Ex 5), Applicant states time served was July 1995 until October 1996. In his answer to the SOR (Gov Ex 3) Applicant says the correct dates were July 1995 to October 1995.

In September 1998, Applicant completed his SF 86. Question 27 asked him if, since age 16 or the last seven years, whichever is shorter, had he illegally used any controlled substance, and specifically listed marijuana, cocaine, and heroin. He answered "no" to the question. In his answer to the SOR, Applicant states:

My response is that while I was filing out the Form 86, I was confused. My mind was not thinking straight, I somehow checked "No" instead of yes of my illegal use of drug activity.

I'll admit. I failed to disclose that I used Cocaine and Heroin daily from 1980's until July 1995 my mistake, I thought I wrote down that information. I most likely forgot where I left off on that question and by passed it. There's no doubt that I would of answered it 'truthfully'

### **POLICIES**

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

**Criminal Conduct** (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

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

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;

**Personal Conduct**, (Guideline E) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

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 include:

None Apply.

### **BURDEN OF PROOF**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." Executive Order 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.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See Executive*

Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

### CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, criminal conduct. Under Guideline J, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of criminal activity which creates doubt about his judgment, reliability, and trustworthiness. Between 1981 and July 1995, Applicant was arrested 19 times. Disqualifying Condition (DC) a (Allegations or admission of criminal conduct, regardless of whether the person was formally charged. ) and b (A single serious crime or multiple lesser offenses.) applies.

In July 1995, Applicant was arrested for being under the influence of a controlled substance and sentenced to time served. In his sworn statement he said the time served was July 1995 through October "1996." However, in his SOR answer he says time served ended in October 1995. If Applicant was in jail awaiting his case to be heard, the speedy trial statutes would require the case to have been heard in 1995 and not 1996. Additionally, it is unlikely Applicant would have served 14 months incarceration merely for being under the influence of a controlled substance. I find "time serve" ended in October 1995.

Applicant last used illegal drugs in July 1995 and has not been arrested since then. Mitigating Condition (MC) a (The criminal behavior was not recent.) applies. I find for Applicant as to SOR paragraphs 1.a and 1.b.

In 1989, Applicant was sentenced to 16 months incarceration at the state rehabilitation center. Applicant was incarcerated for 10 or 11 months. At the time the SOR was issued, absent a waiver from the Secretary of Defense, the Department of Defense was prohibited from granting or continuing a security clearance for any applicant who, as a result of a conviction in any U.S. court, had been sentenced to more than a year in jail. 10 U.S.C. § 986. On 28 October 2004, the President signed into law amendments to that statute. The statute now provides that the prohibition on granting security clearances to applicants convicted of crimes for which they were sentenced to more than one year in jail applies only to cases in which the applicant actually served at least a year in jail. 10 U.S.C. § 986 does not apply to Applicant, because he was never incarcerated for one year. I find for the Applicant as to SOR paragraph 1.c.

The Government has satisfied its initial burden of proof under Personal Conduct, Guideline E. Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions, in providing false information on his September 1998 SF 86 poses a serious potential risk to the nation's security.

Applicant's drug use occurred at least from 1973 through 1995, a period exceeding 20 years. His usage included addiction, daily use, homelessness, and numerous arrests. In September 1998, when Applicant completed an SF 86 he answered "no" to question 21, which asked him about his illegal drug use during the previous seven years. The question specifically listed marijuana, cocaine, and heroin use.

The passage of time can mitigate falsified responses to SF 86s, especially when the falsification occurred six years ago. However, Applicant illegal drug use was so extensive and over such a long period that failure to list it on his SF 86 can not be excused.

None of the mitigating conditions apply to his false answer. His illegal drug use was pertinent to a determination of judgment, trustworthiness, or reliability. There is no showing the Applicant made a prompt, good-faith effort to correct the falsification before being confronted with the facts. Nor is there an indication his omissions were caused by improper or inadequate advice from authorized personnel or based on advice from legal counsel. Because of the serious nature of his falsification, I find against the Applicant as to Personal Conduct, SOR paragraphs 2. b.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Criminal Conduct: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2 Personal Conduct: AGAINST THE APPLICANT

Subparagraph 2.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. Clearance is denied.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.