

DATE: April 23, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-04115

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was convicted in 1983 of Burglary and Criminal Mischief. He was given suspended sentences of 10 years and 5 years in prison, respectively. He also falsified a security clearance application regarding his criminal history. The provisions of 10 U.S.C., §986 apply. Adverse inference is not overcome. Clearance is denied.

**STATEMENT OF THE CASE**

On November 15, 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 March 27, 2003, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on or about November 21, 2003. 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 December 2, 2003, and submitted a letter from his supervisor on January 2, 2004. The case was received by the undersigned on January 29, 2004.

**FINDINGS OF FACT**

The Applicant is 39, single and has a high school diploma. He is employed by a defense contractor as a Journeyman Technician, 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 and the exhibits.

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.

The Applicant has an extensive criminal history. He admits in his Answer subparagraphs 1.a. through 1.g. of the SOR and those admissions are deemed findings of fact. He denies that subparagraph 1.h. was an arrest for Operating a Vehicle While Under the Influence of Drugs in June 1982. Rather, he admits that the arrest was actually for Operating a Vehicle While Under the Influence of Alcohol.

The Applicant's most serious criminal activity took place in January 1983. He and a friend broke into a closed school building, stole equipment and vandalized it. He was 18 years old at the time. The Applicant was arrested and charged with Burglary in the Second Degree (a felony) and Criminal Mischief in the Second Degree (a misdemeanor). He plead guilty to both charges in February 1983 and was sentenced to 10 years in prison for the first offense and 5 years in prison for the second offense. The sentences were to run concurrently and were suspended. He was put on probation for four years, ordered to pay restitution and avoid alcohol. Due to the Applicant's conviction and sentence to more than one year in prison, the provisions of 10 United States Code, Section 986 apply.

The Applicant had a rocky time on probation. In addition to many driving infractions, he was arrested and convicted for Operating a Motor Vehicle Under the Influence of Alcohol in October 1983 and November 1985. In June 1986, he was also charged and convicted for Driving While License Suspended. He refused to pay his fine and his probation was extended another year. Finally, in January 1988, the Applicant violated his probation by leaving his home state without permission of his probation officer. His probation was violated, and he was arrested and returned to his home state. On July 14, 1988, he was ordered to complete his original sentence, with credit for 144 days already served.

The Applicant was incarcerated from July 15, 1988 through February 16, 1989. He was paroled in March 1989. The Applicant received his final discharge from parole on April 19, 1991.

Within a month after leaving prison, the Applicant was involved in a bar fight that resulted in a Disorderly Conduct conviction. He received a \$25 fine for this offense.

The Applicant next got into trouble in May and June 1994. He was arrested for Shoplifting from different department stores in each of those months. For the second offense he was sentenced to 365 days in prison (suspended). He also received fines for both offenses. The Applicant has had no further incidents of criminal conduct since June 1994, and expresses a credible intent not to engage in any other criminal conduct in the future.

Paragraph 2 (Guideline G - Alcohol abuse). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he uses intoxicants to excess.

The Applicant admits that he had an alcohol problem for many years. This is shown by his history of excessive drinking, including three arrests for Operating a Motor Vehicle while Under the Influence of Alcohol. When he was incarcerated in 1988, the Applicant was evaluated by the state prison authorities as alcohol dependent. He received treatment for alcohol abuse while in prison, but was unable to remain abstinent after his release.

In 1998, the Applicant admitted to his employer that he was addicted to drugs (Government Exhibit 11). He was diagnosed at that time as Alcohol Dependent, in remission. (Government Exhibit 12 at 7.) The Applicant continued to drink alcohol socially until approximately 2001. The Applicant states in his Answer, "I do not continue to drink alcohol of any kind."

Paragraph 3 (Guideline H - Drug abuse). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he abuses illegal drugs.

The Applicant has an extensive drug abuse history. Among the drugs he used in the 1980s were hashish, cocaine on a daily basis, LSD, hallucinogenic mushrooms, amphetamines and Ecstasy.

The Applicant first began using marijuana in 1977. In the beginning he used marijuana on a monthly basis. His use increased to daily from about 1982 until he entered prison in 1987. Beginning in 1989 the Applicant began to use marijuana daily until 1990. From 1991 until 1993, his use decreased to weekly or monthly use. During 1993 and 1994 he again used marijuana daily. His use decreased to monthly in 1994 and continued at that rate until he stopped all drug use in November 1998. (Government Exhibit 14 at 5.)

The Applicant's main drug of choice was crystal methamphetamine, "crank." He first used it from 1983 until he entered prison in 1987. He used the drug on a daily basis at that time. The Applicant began using crank again in 1991 on a daily basis until he entered treatment in November 1998. (Government Exhibit 14 at 6-7.)

In November 1998, as described under Paragraph 2, above, the Applicant informed his employer that he was addicted to drugs. The Applicant attended a ten day inpatient treatment program, followed by several months of aftercare. He successfully completed the programs. (Government Exhibit 14 at 4.) He expresses a credible intent not to use marijuana, crystal methamphetamine or any other illegal drug in the future.

Paragraph 4 (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 November 23, 1999, the Applicant completed an official DoD questionnaire in which he stated that he had never been charged or convicted of any offenses related to alcohol or drugs. (Government Exhibit 13, question 24.) This statement was a false answer to a material question pertaining to the Applicant's alcohol related criminal history.

Question 26 of Government Exhibit 13 requires the Applicant to state whether, within seven years of the date of the questionnaire (November 23, 1999) the Applicant had been charged with, or convicted of offenses not otherwise covered by other questions in the Security Clearance Application. The Applicant stated "No" to this question. This answer was false since the Applicant had two shoplifting convictions in 1994. In his Answer the Applicant stated, "I wrongly thought that the crimes I committed were close enough to the 7 year mark that it may be alright to leave it out. Please remember that on my security clearance application prior to this one, I did provide that information." The file contains no other Security Clearance Applications of the Applicant's.

The Applicant admitted his extensive use of crystal methamphetamine on questions 27 and 28 of Government Exhibit 13. However, the Applicant did not admit that he used marijuana on a daily basis within seven years of the questionnaire completion date (question 27). He further did not admit that he was using marijuana while holding a security clearance (question 28).

#### Mitigation.

The Applicant's supervisor submitted a letter of recommendation (Applicant's Additional Information). In that letter, dated December 19, 2003, he states, "For the better part of 8 years, [the Applicant's] knowledge and skills [have] earned him a reputation of a much respected individual."

### **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 guideline. 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.
- (3) Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year; [\(1\)](#)

Conditions that could mitigate security concerns:

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

Guideline G (Alcohol consumption)

Conditions that could raise a security concern:

- (1) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol abuse;
- (4) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

Condition that could mitigate security concerns:

- (3) positive changes in behavior supportive of sobriety;

Guideline H (Drug involvement)

Conditions that could raise a security concern:

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

Conditions that could mitigate security concerns:

- (1) the drug involvement was not recent;
- (3) a demonstrated intent not to abuse any drugs in the future;

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;

Condition that could mitigate security concerns:

- (2) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

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 guidelines 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 criminal conduct, drug and alcohol abuse, and falsification of Government documents 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); used alcohol to excess (Guideline G); has an extensive criminal record, including a conviction and sentence to over one year in prison (Guideline J); and that he intentionally made false material statements to DoD (Guideline E).

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), all of the Applicant's criminal conduct is over nine years old, most of it over 15 years old. In the eight years he had been with his current employer he has engaged in no other criminal acts. Specifically, mitigating conditions 1 (*the criminal behavior was not recent*) and 6 (*there is clear evidence of successful rehabilitation*) apply to subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f. and 1.h. They are found for the Applicant.

Next we turn to Paragraph 2 (Guideline G). By his own admission, the Applicant has had an alcohol problem through the 1980s and the 1990s. However, after his treatment in 1998 and 1999, the Applicant appears to have turned his life around and learned to live without alcohol. Disqualifying conditions 1 (*alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol abuse*) and 4 (*evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program*) apply to this case because of his history of alcohol related offenses and his treatment in 1998. However, given his treatment and almost three years of abstinence, I find that mitigating condition 3 applies (*positive changes in behavior supportive of sobriety*). Paragraph 2 is found for the Applicant.

Concerning Paragraph 3 (Guideline H). Applicant's extensive marijuana and crystal methamphetamine use ended over five years ago. His other drug use occurred 20 or more years ago. It is to the Applicant's credit that he approached his employer and informed them of the problem. There is no evidence that it has recurred, and the Applicant expresses a credible intent not to use any drugs in the future. Disqualifying conditions 1 (*any drug abuse*) and 2 (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution*) are applicable to the facts in this case. However, they are overcome by the Applicant's subsequent good behavior, which brings mitigating conditions 1 (*the drug involvement was not recent*) and 3 (*a demonstrated intent not to abuse any drugs in the future*) into play. Accordingly, Paragraph 3 is found for the Applicant.

The Applicant admitted to the Government his extensive use of crystal methamphetamine in Government Exhibit 13, questions 27 and 28. In my opinion, the Government was put on notice that the Applicant was an extensive drug user. Under the particular circumstances of this case, I find that the Applicant did not intend to deceive the Government about the extent of his drug use. Subparagraphs 4.c. and 4.d. are found for the Applicant.

The Applicant's criminal conviction for Burglary and Criminal Mischief in 1983 included suspended sentences of 10 and 5 years, respectively. Disqualifying condition 3 (*conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year*) applies to subparagraph 1.g. Under the terms of 10 United States Code, Section 986, I have no discretion and must find against the Applicant. Paragraph 1 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. I have examined the Applicant's explanations for the falsifications described in subparagraphs 4.a. and 4.b. Based on the state of the record, I do not find them credible. I do not have any earlier applications of the Applicant in the case file. Therefore, I cannot determine the truth or veracity of his statements. The burden is the Applicant's to make and he has not made it. Disqualifying Condition 2 applies (*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*). Guideline E is 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. Under the particular circumstances of this case, this evidence does not overcome the adverse information that has been presented by the Government.

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 4 of the Government's Statement of Reasons. As set forth

above, Paragraphs 2 and 3 are found for the Applicant.

### **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.: For the Applicant.

Subparagraph 1.c.: For the Applicant.

Subparagraph 1.d.: For the Applicant.

Subparagraph 1.e.: For the Applicant.

Subparagraph 1.f.: For the Applicant.

Subparagraph 1.g.: Against the Applicant.

Subparagraph 1.h.: For the Applicant.

Subparagraph 1.i.: Against the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: For the Applicant.

Subparagraph 2.b.: For the Applicant.

Subparagraph 2.c.: For the Applicant.

Subparagraph 2.d.: For the Applicant.

Paragraph 3: For the Applicant.

Subparagraph 3.a.: For the Applicant.

Subparagraph 3.b.: For the Applicant.

Subparagraph 3.c.: For the Applicant.

Subparagraph 3.d.: For the Applicant.

Subparagraph 3.e.: For the Applicant.

Subparagraph 3.f.: For the Applicant.

Subparagraph 3.g.: For the Applicant.

Subparagraph 3.h.: For the Applicant.

Subparagraph 3.i.: For the Applicant.

Subparagraph 3.j.: For the Applicant.

Paragraph 4: Against the Applicant.

Subparagraph 4.a.: Against the Applicant.

Subparagraph 4.b.: Against the Applicant.

Subparagraph 4.c.: For the Applicant.

Subparagraph 4.d.: 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

1. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.
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.