

DATE: August 26, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-06650

**DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

**APPEARANCES**

**FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

**FOR APPLICANT**

Richard L. Moorhouse, Esq., Jason P. Matechak, Esq.

**SYNOPSIS**

In view of Applicant's falsifications of his drug use, coupled with the underlying 23-year-history of drug use, Applicant's evidence in rehabilitation and reform is insufficient to establish his ultimate burden of persuasion under drug involvement, personal conduct, and criminal conduct. Clearance is denied.

**STATEMENT OF CASE**

On July 12, 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 by Change 4, April 20, 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. The SOR is attached. Applicant filed his Answer to the SOR on August 28, 2002.

The case was received by me on January 21, 2003. A notice of hearing was issued on April 21, 2003, and the case was heard on June 4, 2003. The Government and Applicant submitted documentary evidence. The Government called no witnesses. Testimony was taken from Applicant. The transcript was received on June 24, 2003.

**RULINGS ON PROCEDURE**

Following the hearing, Appellant furnished test results dated June 21, 2003, which have been admitted in evidence as Applicant's Exhibit (AE) M.

**FINDINGS OF FACT**

The SOR alleges drug involvement (Guideline H), personal conduct (Guideline E), and criminal conduct (Guideline J). Applicant's admissions to all the factual allegations shall be incorporated into the following Findings of Fact: Applicant

is 40 years old and employed as a technical engineer for a defense contractor. He seeks a secret security clearance.

Applicant used marijuana on a weekly basis in 1977 and stopped in 1996 when he began using cocaine. Occasionally he purchased the marijuana. Applicant was arrested for possession of marijuana on September 14, 1983. Appellant pled guilty but the court deferred adjudication of Applicant's sentence on condition he complete 6 months probation. On May 22, 1984, Applicant completed 6 months probation, and the charges were dropped.

In a signed sworn statement on January 17, 1984, (GE 5) Applicant stated, "In the future I won't use marijuana because it tends to make me loose (sic) touch with my responsibilities." In a signed sworn statement on April 17, 1986 (GE 6), Applicant stated, "I don't intend to use marijuana again because [it] may interfere with my work as a data base system architect or deteriorate my thought process." In September 1986, Applicant was granted a Secret security clearance but continued to use marijuana. Applicant was granted a Top Secret security clearance in January 1991 but continued to use marijuana once a week.

Applicant used cocaine mostly on the weekends from 1995 (Tr. 95) to October 1, 2000, when he was arrested for possession of cocaine. <sup>(1)</sup> The cocaine made Applicant feel like he had a lot of energy.

On October 1, 2000, Applicant was arrested for possession of cocaine, a felony. On March 13, 2001, Applicant pled guilty to the charge. On May 10, 2001, the Court sentenced him to substance abuse screening and treatment, to continue with group counseling, and to undergo random drug screening. The court also ordered Applicant successfully complete 18 months of supervised probation, perform 100 hours of community service, pay \$500.00 court costs; Applicant's driver's license was suspended for 6 months. Applicant completed all the court-ordered conditions and all appointments by August 13, 2002. (AE F) On December 2002, the Court vacated its previous finding of guilt; the original charge was dismissed, and Applicant was discharged from probation.

Pursuant to one of the conditions imposed by the court, Applicant enrolled in substance abuse counseling on April 10, 2001 and, according to the substance abuse counselor, completed the counseling in July 2001. <sup>(2)</sup> (AE G) Applicant stated that his therapy consisted of, "[B]asically, we met twice week, where we sat down and talked about different issues, our drug usage and so forth." (Tr. 74) <sup>(3)</sup> The counselor reassessed Applicant in August 2002 and a urine drug test was administered with negative results. (AE H) The counselor opined Applicant's 14 month period of abstinence is a good indicator Applicant is able to maintain sobriety. The most influential incentive Applicant has that keeps him from using drugs is the fear of getting arrested and having to face incarceration. (Tr. 77)

Applicant's drug abuse was a factor in causing him to miss work while employed by a government agency in 2000 (Tr. 60; GE 4), however, he believed a personality clash with the government representative was the real reason behind his eventual lay-off from the government agency in 2000. (Tr. 54-57)

In January 2003, Applicant received a pay raise and promotion by the salary review board of his employer. A manager from Applicant's previous employer in 1984 recalled Applicant showed initiative, a positive attitude, and a strong work ethic. On November 30, 1998, Applicant received a certificate for his contributory effort to a project. In August 2000, Applicant qualified for level one administration assignments. On February 12, 2003, Applicant was awarded a leadership award for his work on the business council activities.

All Applicant's urine tests have been negative. (AE H, M)

Considering the evidence as a whole, including Applicant's demeanor and conduct at the hearing, Applicant's overall credibility is undermined by his intentional omission of his drug history on his security form, his intentional misrepresentations regarding future drug use, and the 14 years he used drugs while holding a security clearance.

## 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:

### **Drug Involvement**

Disqualifying Factors (DC):

1. Any drug use;
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
5. Recent drug involvement, especially following the granting of a security clearance, or an intent not to discontinue use, will almost invariably result in an unfavorable determination.

Mitigating Factors (MC):

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 (DC):

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;
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 (MC):

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness and reliability;
2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

### **Criminal Conduct**

Disqualifying Conditions (DC):

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime.

Mitigating Conditions (MC):

1. The criminal behavior was not recent;

2. The crime was an isolated incident;
3. There is clear evidence of successful rehabilitation.

### **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; (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 a *prima facie* case against Appellant under drug involvement (Guideline H), personal conduct (Guideline E), and criminal conduct (Guideline J) that raises doubt about Applicant's judgment, reliability and trustworthiness. Then, the Applicant has the ultimate burden of demonstrating with evidence in refutation, explanation, mitigation or extenuation that it is clearly consistent with the national interest to grant or continue his security clearance.

### **CONCLUSIONS**

Applicant's illegal involvement with drugs under Guideline H raises doubt about his capabilities of safeguarding classified information. First, Applicant's drug abuse falls within DC 1 based on Applicant's use of marijuana for 18 years and use of cocaine for 5 years between 1977 and October 2000. Applicant's marijuana use must be characterized as regular between 1977 and 1996 because he used the drug on a weekly basis. Applicant also used cocaine regularly on the weekends from 1995 to October 2000.

Second, Applicant's purchase of marijuana falls within DC 2 of the drug involvement guideline. Third, Applicant's continued drug use after being granted a Secret security clearance in September 1986, and after being granted a Top Secret security clearance in January 1991 represents disqualifying conduct under DC 5. As set forth under DC 5, recent drug involvement following the granting of a security clearance will almost invariably result in an unfavorable determination.

Sixth, Applicant's cocaine abuse was a factor in his lay-off from a federal job in 2000. (Tr. 60; GE 4)

The Directive permits drug abuse to be mitigated when the drug involvement was not recent. (MC 1) Although the record reflects no drug use after October 2000, overall his drug use cannot be considered isolated or aberrational. (MC 2) Though Applicant has declared an intention not to use any drugs in the future, he has made the same promise regarding his drug use in January 1984 and April 1986 when he claimed he did not want to cloud his judgment. Yet, he used marijuana on a weekly basis from 1977 to 1996, and cocaine, thereafter.

The evidence in rehabilitation is unclear as to when Applicant completed treatment. AE G indicates July 2001 while AE I reflects August 2002 as the ending date for treatment. Applicant refers to nearly 2 years of aftercare in the supplement to his answer, yet neither of AE G nor AE I mentions aftercare. Finally, Applicant refers to 2 years of NA meetings, yet he could barely recall the first step of the NA program. To Applicant's credit, the evidence shows negative urine tests in

August 2002 and June 2003, and some constructive changes in Applicant's lifestyle supportive of sobriety. However, because Applicant was on probation until December 2002, it is difficult to determine whether Applicant's abstinence has been motivated simply by his desire to stay out of jail as he has indicated, or from a desire to truly overcome a problem that has had a dominating impact on his life. Given Applicant's 23-year-period of drug use, aggravated by using drugs for 14 years while holding a security clearance, insufficient time has passed to confidently conclude Applicant's drug use will not return.

Applicant's intentional falsification of his sworn statement on January 17, 1984, and his sworn statement on April 16, 1986 represents a deliberate submission of false or misleading information concerning relevant and material matters to an investigator within the scope of DC 3 of the guideline. Applicant's drug use is a material matter the Government should know about before making an informed decision on Applicant's security suitability. Applicant's intentional falsification of his SCA in August 2000 involves the deliberate falsification of relevant and material facts from a personnel security questionnaire within the ambit of DC 2. A person's drug history is critical information the Government should know about to avoid granting a security clearance to a drug user who shows by his past conduct little respect for the law and security regulations.

Under the circumstances of this case, Applicant's disqualifying personal conduct may be mitigated by three conditions. MC 1 is unavailable for mitigation as a person's drug history is always pertinent to a determination of trustworthiness, judgment and reliability. MC 2 cannot be applied to this case because of the recency of Applicant's falsification, which was the third in a pattern of falsifications dating to January 1984. Applicant did not come forward with an accurate account of this drug history until confronted by an investigator in May 2001.

MC 3 of the personal conduct guideline may mitigate an intentional falsification when the individual subsequently makes as prompt, good-faith effort to correct the falsification before being confronted with the facts. Applicant has not done that, therefore, his evidence in mitigation does not mitigate his pattern of personal conduct.

Applicant's personal conduct has independent significance under the criminal conduct guideline. By falsely certifying his answers to questions 27 and 28 of his SCA were true, Applicant violated 18 USC 1001 and DC 1 of the criminal conduct guideline, even though he was never charged. Applicant's commission of the felony possession offense in cognizable under DC 2 of the criminal conduct guideline.

Neither the felony offense nor the intentional falsifications are mitigated by any of the conditions under the criminal conduct guideline. The offenses were recent, and therefore, are removed from consideration under MC 1. Although MC 2 may apply when the crime was an isolated event, the intentional falsifications constitute a pattern of dishonest conduct that is outside the scope of MC 2.

Because there is no evidence Applicant provided the false information against his will or under pressure, MC 3 and MC 4 are not applicable. While Applicant's successful completion of probation, favorable lifestyle changes and negative urine tests reflect some evidence of successful rehabilitation, that evidence is outweighed by the pattern of dishonest conduct and his use of drugs for approximately 14 years while holding a security clearance. Considering the entire record, I find against Applicant under drug involvement, personal conduct, and criminal conduct.

In reaching a decision under each guideline, I have also considered the general policy factors of the whole person concept of the Directive.

### **FORMAL FINDINGS**

Formal findings required by Section 3, Paragraph 7 of the Directive are:

Paragraph 1(drug involvement): AGAINST THE APPLICANT.

1.a. Against the Applicant.

1.b. Against the Applicant.

1.c. Against- the Applicant.

1.d. Against the Applicant.

1.e. Against the Applicant.

1.f. Against the Applicant.

1.g. Against the Applicant.

1.h. Against the Applicant.

1.i. Against the Applicant.

1.j. Against he Applicant.

1.k. Against the Applicant.

1.l. Against the Applicant.

Paragraph 2 (personal conduct): AGAINST THE APPLICANT.

2.a. Against the Applicant.

2.b. Against the Applicant.

2.c. Against the Applicant.

Paragraph 3 (criminal conduct): AGAINST THE APPLICANT.

3.a. Against the Applicant.

3.b. 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 Applicant.

Paul J. Mason

Administrative Judge

1. Applicant recalled a period of abstinence from cocaine for approximately 7 months in 2000 when he attended some Narcotics Anonymous (NA) meetings. (Tr. 68-70)

2. The coordinator for adult services indicated the treatment did not end until August 2002.

3. In the supplement to his Answer, Applicant provided some additional information about the individual and group therapy he participated in, along with the NA meetings and aftercare treatment.