

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. 02-08889

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 37-year-old mechanical engineer who works for a defense contractor. Applicant used marijuana until 2000. He also used cocaine between 1990 and 1993 while he was married. Since his divorce in 1993 he has not used any drug except marijuana. Any other drug use was mitigated sufficiently to resolve concerns about Applicant's eligibility for a security clearance. Applicant did not deliberately falsify his security clearance application regarding his alleged illegal drug use. Clearance is granted.

**STATEMENT OF THE CASE**

On February 28, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) 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 conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated March 24, 2003, Applicant responded to the SOR allegations. He admitted the allegations in Paragraph 1.a. through 1.c. and 1.e. Subparagraph 1.d. he denies. He denied the allegations in Paragraph 2. He requested a hearing.

This case was originally assigned to Administrative Judge Joseph Testan on April 10, 2003. The case was reassigned to me on May 8, 2003 due to caseload considerations. A Notice of Hearing was issued on May 27, 2003, setting the hearing for July 1, 2003. On July 1, 2003, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented three exhibits which were admitted

into evidence pursuant to a stipulation. A Government witness also testified. The Applicant testified and did not present any documentary evidence. I received the transcript of the hearing on July 11, 2003.

### FINDINGS OF FACT

Applicant's admissions to the allegations are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 37 years old and divorced. He works for a defense contractor as a mechanical engineer doing mechanical testing. He has difficulty remembering dates. He was divorced in 1993 from his wife, who was an Air Force member, who used marijuana and cocaine. They were married in 1986. He has not seen her since the divorce. He graduated from high school in 1983, and worked as a car detailer until he went to college. He studied architecture for a year and found he could not draw. Then he discovered mechanical engineering through his interest in automobiles. He graduated from college in 2000 and started working for the defense contractor. He also obtained a master's degree in mechanical engineering. (Tr. 34-39)

Applicant started using marijuana in high school. He continued to use it until October 31, 2000. At that time he realized he was not able to focus on any work and was wasting time when he used marijuana, and that he needed to quit smoking marijuana. He did quit using marijuana. He only used marijuana three times in 2000. He disclosed his marijuana use from 1994 to 1999 on the security clearance application. He did not disclose his use prior to 1994 because it was beyond the seven year-time period requested in the security clearance application and he knew he would be talking to an investigator after he revealed any drug use on his application. He intended to explain the use back to his high school years which included his 1983 graduation year when he first used marijuana. He did not include the 2000 usage because it was so infrequent and there was not room on the application to explain the varying usages he had of the marijuana. He did not think about using the "general remarks" section in Question 43 for that purpose. Applicant has no intention to use marijuana in the future because he now has a profession he likes and has a good income from it which he wants to keep. Applicant has not enrolled in or completed any drug rehabilitation program. (Tr. 20 to 26, 29, 32; Exhibit 1 at 6; Exhibit 2 at 1, 2; Exhibit 3 at 2 and 6)

Applicant's use of cocaine commenced with pressure from his wife at the time. She brought it home and suggested they use it. He did use it 15 to 20 times in one month in 1990. He and his wife smoked it or snorted it. The cocaine was never injected. He stopped using it when he realized how dangerous it was and he did not like it. He used it for only few months between 1990 and 1993. He has not used it at all since his divorce. His entry on the interrogatories (Exhibit 3 at 2) that he used it in "1996?" is an error and he does not remember why he stated that date. (Tr. 26 to 28)

Applicant admitted using in 1998 what he was told was LSD by a friend. He received no effect from whatever he ingested. He forgot about it when he was completing his security clearance application, and then remembered it and put it on his interrogatory. He considers that incident as non-usage because of the evident non-effect on him. (Tr. 21, 24, 42)

Applicant used hashish after high school graduation in the years after 1983. He disclosed that use on the security clearance application even though it was outside the seven year time period. Hashish use did not occur within the seven year time period specified in the security clearance questionnaire and there is no evidence is extended into the 1990s. (Tr. 21)

Applicant freely admitted his drug use history to the investigator and at the hearing. He admitted his confusion on dates, and his poor memory for dates. His use varied so much over time that in his effort to make full disclosure he was unable to write all the variables into the space restrictions of the security clearance application. (Tr. 14, 20, 22)

### POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (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 pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the guidelines.

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 that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

### **Guideline H - Drug Involvement**

(A) Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information

(B) Drugs are defined as mood and behavior-altering substances and include:

(1) Drugs, materials and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens); and

(2) Inhalants and other similar substances.

(C) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

(1) Any drug abuse (see above definition);

(2) Illegal drug possession, including purchase.

(E) Conditions that could mitigate security concerns include:

(1) The drug involvement was not recent;

(3) A demonstrated intent not to abuse any drugs in the future.

**Guideline E - Personal Conduct:**

(A) 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. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

Refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personal security or trustworthiness determination.

(B) Conditions that could raise a security concern and may be disqualifying also include:

(2) The deliberate omission, concealment, falsification or misrepresentation 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;

(C) Conditions that could mitigate security concerns include:

(3) The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.

(5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

**CONCLUSIONS**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and

conditions above, I conclude the following with respect to each allegation set forth in the SOR:

**Guideline H - Drug Involvement.** The Government established its case by its evidence and Applicant's admissions. Under Guideline H, an applicant's illegal involvement with drugs raises questions regarding his willingness to protect classified information. I conclude Disqualifying Conditions (DC) 1 and 2 apply here. A security concern may exist if an applicant uses or purchases illegal drugs such as marijuana.

However, the record evidence is that Applicant's drug use was mainly in the 1980s when he was in high school and thereafter. His former wife seemingly influenced him also, at least in the use of cocaine on four or five occasions. His cocaine use stopped in 1993. The marijuana use ceased in 2000. The LSD accusation is supported only by Applicant's admission, and even he is not certain he took LSD because he felt or suffered no effects. I conclude he did not ingest LSD. The last marijuana use was three years ago. Therefore, the drug use is not recent. (MC 1) Applicant has demonstrated his intent not to use drugs in the future. (MC3). Accordingly, the finding is for the Applicant.

I should note at this point an important consideration in this case. I find the Applicant credible based upon his sincerity and the logic of his presentation. He was polite, well-dressed, and matter-of-fact in his testimony. While others may hear and read in his statements inconsistency, I found his recollections were reasonable and his explanations persuasive. He obviously has difficulty remembering dates. I found it significant also that he made his own decision to stop using drugs because he realized he was going nowhere with his life. He now has a bachelor's degree and a master's degree in mechanical engineering, and a good professional job which is vastly superior to the auto detailers' jobs he had until his college graduation. He has a lot at risk after 17 years of low-paying jobs and intermittent drug use.

**Guideline E - Personal Conduct:** I conclude the Government established by its evidence and Applicant's admissions the apparent validity of the allegations as set forth in subparagraph 1.a. and 1.b. Under Guideline E 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. A security concern may exist when an applicant deliberately omits, conceals, or falsifies relevant and material facts from his personnel security questionnaire or deliberately provides false or misleading information concerning relevant and material matters to an investigator in connection a personnel security determination. Through Applicant's admissions, the Government established a prima facie case that Applicant omitted several material facts on his security clearance application in 2001. Therefore, Disqualifying Condition (DC) 2 applies.

Applicant explained at the hearing that he was told to complete the security clearance application quickly one Friday afternoon. He knew that once he disclosed the information about his marijuana use in Question 27, that he would be questioned further. I believe his explanation, and the further explanation that his use varied so much that he thought it better to try to explain it to the investigator rather than write it on the form's limited space. I believe this Applicant's explanation. I conclude his incomplete disclosure of marijuana use was more inadvertent, due to inexperience, and faulty recollections, and the crush of time constraints than a deliberate plan to hide information from the Government. His demeanor is not that of a mendacious conniver. Mitigating Conditions (MC) 3 and 5 apply. Applicant fully disclosed the information when given the chance to explain his varied drug usage, and to put that explanation into writing. He gave more information than he needed to give on his varied use by going beyond the seven years required. Applicant has taken positive steps to correct his previous behavior and has placed himself in a new professional environment, leaving his former wife and drug-using friends behind.

In the decision-making process, the burden of proving evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust an

confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

### **FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline H: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2 Guideline E: For Applicant

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

### **DECISION**

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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Philip S. Howe

Administrative Judge