

DATE: December 22, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-11387

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Katherine Antigone Trowbridge, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

In his high school, college, and post-college years, Applicant used marijuana approximately 75 to 100 times. He also used mushrooms (psilocybin) twice while in college. He used marijuana while holding an interim security clearance. Applicant did not list his drug use on his security clearance application because he was embarrassed and did not want his employer to learn of his drug use. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On April 17, 2003, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on May 12, 2003, and elected to have a hearing before an administrative judge. The case was assigned to me on July 14, 2003. On July 17, 2003, a Notice of Hearing was issued. On July 31, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on August 8, 2003.

**FINDINGS OF FACT**

The SOR contains six allegations of disqualifying conduct. Three allegations relate to conduct charged under Guideline H, Drug Involvement; two allegations relate to conduct charged under Guideline E, Personal Conduct; and one allegation relates to conduct charged under Guideline J, Criminal Conduct. In his answer to the SOR, Applicant admitted all six factual allegations. At the hearing, Applicant testified that he did not hold a security clearance in December 2000, when he completed and signed his security clearance application (SF-86), as alleged in subparagraph 2.b. of the SOR. Department Counsel accordingly requested a finding for Applicant as to allegation 2.b. of the SOR. Applicant's admissions as to allegations 1.a., 1.b., 1.c., 2.a., and 3.a. of the SOR are incorporated as findings of fact.

Applicant is 25 years old. He graduated from high school in 1996 and from college in 2000. Since May 2000, he has been employed as a mechanical engineer by a defense contractor. A good friend and his supervisor submitted letters attesting to Applicant's reliability, maturity, and good character. (Ex. A; Ex. B.)

Applicant used mushrooms<sup>(3)</sup> (psilocybin) twice in 1996 and 1997. He used marijuana 75 to 100 times during the period from 1994 to the summer of 2001. Applicant began using marijuana in social settings in 1994, while he was a high school student. His use of the drug became more extensive from May 1996 to September 1999. He continued to use marijuana with less frequency until the mid-summer of 2001. Applicant contributed money to purchase the marijuana he used. (Ex. 3, at 2.)

Applicant was granted an interim security clearance on or about January 5, 2001, and he was notified of the grant of interim clearance sometime thereafter by his employer. (Tr. 18-19.) Applicant used marijuana in the mid-summer of 2001, while holding an interim security clearance.

Applicant completed, signed, and certified a security clearance application (SF-86) on December 5, 2000. Question 27 on the SF-86 reads as follows: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?" Applicant responded "no" to Question 27.

One year later, in December 2001, Applicant was interviewed by an agent of the Defense Investigative Service, and, in a signed, sworn statement, he admitted his use of marijuana and mushrooms (psilocybin) and supplied details of his drug use. He stated that he falsified his answer to Question 27 on his SF-86 because he did not want his employer to learn of his drug use. (Ex. 3, at 3.)

## 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* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to

grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline H, Drug Involvement**

In the SOR, DOHA alleged under Guideline H that Applicant had used marijuana 75 to 100 times between the end of 1994 and the mid-summer of 2001 (¶ 1.a.); that he used marijuana after being granted an interim security clearance (¶ 1.b.); and that he used mushrooms (psilocybin) twice in 1996 and 1997 (¶ 1.c.).

The Government's concern with Guideline H conduct is that it raises questions regarding an individual's willingness to protect classified information. Drug abuse or dependence may impair social or occupational functioning, thereby increasing the risk of an unauthorized disclosure of classified information. ¶ E2.A8.1.1.1.

Drugs are defined under Guideline H as mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, and inhalants and other similar substances. ¶¶ E2.A8.1.1.2., E2.A8.1.1.2.1., E2.A8.1.1.2.2. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. ¶ E2.A8.1.1.3.

Through Applicant's own admissions, the Government established a *prima facie* case that he used and purchased illegal drugs and used an illegal drug after being granted an interim security clearance. Applicant has admitted Guideline H drug involvement specified in the SOR and identified as disqualifying under ¶¶ E2.A8.1.2.1., E2.A8.1.2.2., and E2.A8.1.2.5. of Guideline H. (4)

The record shows that Applicant's involvement with illegal drugs, which lasted seven years, ended a little more than 2½ years ago, in mid-summer 2001. His drug involvement, thus, is recent and neither isolated nor aberrational. Accordingly, mitigating conditions E2.A8.1.3.1 and E2.A8.1.3.2. do not apply. In his signed, sworn statement and at his hearing, Applicant stated that he had no intention of using drugs in the future. (Ex. 3, at 3: Tr. 21-22.) I find his statement credible when weighed with his testimony and demeanor at his hearing, and I conclude that mitigating condition E2.A8.1.3.3 applies to Applicant's Guideline H conduct. However, despite the applicability of this one mitigating condition, Applicant presents insufficient evidence to rebut or mitigate the disqualifying conduct under Guideline H which he has admitted to. Accordingly, the allegations in the SOR of disqualifying conduct under Guideline H are concluded against the Applicant.

### **Guideline E, Personal Conduct**

In the SOR, DOHA alleged that Applicant's illegal drug use, as specified in subparagraph 2.a., raised security concerns under Guideline E, Personal Conduct. Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Conceding that the allegations in subparagraph 2.b. of the SOR were not based upon the record evidence, the Government requested that subparagraph 2.b. be concluded for the Applicant. Applicant accurately and adequately demonstrated that he did not hold a security clearance at the time he completed and signed his SF-86 in December 2000. Accordingly, allegation 2.b. is concluded for the Applicant.

With respect to the Guideline E conduct alleged in SOR subparagraph 2.a., the Government has established its case. In subparagraph 2.a., the Government alleged that, in executing his response to Question 27 on the SF-86, Applicant deliberately failed to disclose the drug use identified in subparagraphs 1.a., 1.b., and 1.c. of the SOR. Applicant's failure to answer question 27 completely, truthfully, and correctly raises a security concern under ¶ E2.A8.1.2.2. of Guideline E. In his testimony, Applicant stated that he knew his answer to Question 27 was not complete and correct and he had lied. (Tr.31.) He said he was afraid to answer the question correctly because he was embarrassed and didn't want his employer or those associated with his employer to read his SF-86 and find out that he had used illegal drugs. ( Ex. 3, at 3.) His concealment of information he considered embarrassing could make him vulnerable to coercion and blackmail. ¶ E2.A5.1.2.4. His conduct raises additional concerns under ¶ E2.A5.1.2.5 because it suggests a pattern of dishonesty or

rule violation. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government. It is well established that embarrassment is not a mitigating condition under the Directive. ISCR Case No. 99-0557 at 3 (App. Bd. July 10, 2000).

Mitigating condition E2.A5.1.3.1 does not apply to the facts of this case: the information withheld by Applicant is pertinent to a determination of his judgment, trustworthiness, and reliability. Only one other mitigating condition under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. ¶ E2.A5.1.3.2. While Applicant supplied the correct information when questioned by a special agent of the Defense Investigative Service one year after he completed his SF-86, the falsifications were not isolated incidents and they are recent. Accordingly, allegations in subparagraph 2.a. of the SOR are concluded against the Applicant.

### **Guideline J, Criminal Conduct**

In the SOR, DOHA alleged in ¶ 3.a. under Guideline J that Applicant demonstrated a history or pattern of criminal activity by deliberately lying about his drug use in his response to Question 27 on his SF-86. When he completed his SF-86, Applicant signed his name below the following statement:

#### **CERTIFICATION BY PERSON COMPLETING FORM**

My statement on this form, and any attachments to it, are true, complete and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both (See section 1001 of title 18, United States Code).

Under section 1001 of title 18 of the United States Code, it is a felony crime to make a knowing and willful false statement on the SF-86. Applicant has admitted the conduct alleged in subparagraph 3.a. of the SOR.

The security concern under Guideline J is that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy. Applicant's knowing and willful false statement constitutes disqualifying conduct under ¶ E2.A10.1.2.2. of Guideline J. None of the Guideline J mitigating factors apply, and allegation 3.a of the SOR is concluded against the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

Paragraph 3. Guideline J.: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

**DECISION**

In light of all of 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. Clearance is denied.

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**Joan Caton Anthony**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. The SOR and the Applicant used the colloquial term "mushrooms" for the hallucinogen psilocybin.
4. Subparagraph E2.A8.1.2.5. of Guideline H reads, in pertinent part: "*Recent* drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will *almost invariably* result in an unfavorable determination." (Italics in original.)