

DATE: December 30, 2002

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11739

**DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

**APPEARANCES**

**FOR GOVERNMENT**

Henry Lazzaro, Esq., Department Counsel

**FOR APPLICANT**

Pro se

**SYNOPSIS**

Applicant's marijuana abuse from 1988 to the end of 2001 is disqualifying under the drug involvement guideline. In addition, Applicant's intentional falsifications of (1) his responses to questions 27 and 29 of his security questionnaire in July 2001, and (2) his sworn statement in March 2002, is disqualifying under the personal conduct guideline. Finally, the intentional falsifications carry independent significance within the ambit of criminal conduct. Clearance is denied.

**STATEMENT OF CASE**

On July 10, 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 April 4, 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. Applicant filed his Answer to the SOR on August 15, 2002. Applicant elected to have his case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on October 7, 2002. Applicant received the FORM on October 23, 2002. His response was due 30 days later or by November 22, 2002. No response was received. The case was received by the undersigned for decision on December 12, 2002.

**FINDINGS OF FACT**

The SOR alleges drug involvement, personal conduct and criminal conduct. In addition to admitting all the factual allegations of the SOR, Applicant submitted a supplemental statement addressing major events in his life. His falsification of the security questionnaire in July 2001 was partially due to a serious medical condition he discovered he had in 1998. Applicant's falsification also was a product of the shame he felt about his past actions. He now realizes honesty is the best policy. He needs a second chance to prove he has turned his life around.

**Drug Involvement**

Applicant's drug involvement originated in 1988 when he began using marijuana. (1.a.) He used the drug on a weekend basis from end of 1998 to the end on 2001 or the beginning of 2002. Applicant purchased marijuana (1.b.) periodically.

Applicant purchased and used LSD twice a year from 1993 to 1999. (1.c., 1.d.)

Applicant was arrested on June 14, 1994, with 1 felony count of Delivery of Marijuana and 1 felony count of Conspiracy to Deliver Marijuana. (1.e.(1.), 1.e.(2).) He pleaded guilty to first count and adjudication was withheld; he was sentenced to 18 months supervised probation and ordered to pay \$315.00 in fines. The second count was dismissed. On December 8, 1995, Applicant was cited for violating probation for not paying his court fine. His probation was not revoked. (1.); rather, it was continued then terminated the next month when he paid the balance of the court fine.

Applicant used Ecstasy (1.f.) in 1998, and he used cocaine twice in 1998/1999. (1.g.)

### **Personal Conduct**

In January 1992, Applicant violated military regulations by being absent without leave. Applicant was fined \$440.00 per month for two months, reduced in grade from E-3 to E-2, restricted for 45 days, and required to perform extra duty for 45 days.

On July 30, 2001, Applicant filled out a security questionnaire. In that questionnaire, Applicant intentionally falsified his response to question 27 (use of illegal drugs since age of 16 or in the last 7 years). Applicant also intentionally falsified his response to question 29 (illegal purchase or transfer of any drug). According to the supplement to his Answer to the SOR, he knew his "no" answer to both questions was false. (Item 3)

Applicant furnished a sworn statement on March 13, 2002, falsely claiming he had never used drugs. (Item 6) Applicant indicated in the sworn statement, "I have never been involved in any Drug Activity, such as drug trafficking/production. Regardless of the fact that I was found guilty of delivery of cannabis. I believe I was wrongly found guilty because I did not know what was happening at the time." Applicant even disputed a probation report indicating he had used marijuana as a youth and as recent as 1994.

### **Criminal Conduct**

Applicant's intentional falsifications of his security questionnaire and sworn statement carries independent significance under the criminal conduct guideline, and shall be discussed below in Conclusions.

Applicant's military discharge records reflect he was discharged from the United States Marines in July 1992, under Honorable Conditions. During his military service, he received the Good Conduct Medal; he participated in military conflict in 1990. (Item 8)

Applicant is married with two children.

### **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 Conditions:

1. Any drug abuse;
2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Mitigating Conditions:

None.

### **Personal Conduct**

Disqualifying Conditions:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...[to] 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;
5. A pattern of dishonesty or rules violations, including violation of any written or recorded agreement made between the individual and the agency.

Mitigating Conditions:

None.

### **Criminal Conduct**

Disqualifying Conditions:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Mitigating Conditions:

None.

### **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; and, (8) 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 all the factual allegations under Guideline H (drug involvement), Guideline E (personal conduct), and Guideline J (criminal conduct) which establishes doubt about a person's judgment, reliability, and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective, or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation, or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

## **CONCLUSIONS**

### **Drug Involvement**

Because improper or illegal drug involvement can impair social or occupational functioning, it increases the risk of security violations or even unauthorized disclosure of classified information. Applicant has a long history of illegal drug abuse dating to 1988 when he began purchasing and using marijuana. Applicant's regular, weekend use of marijuana did not end until the end of December 2001. In view of the scope, frequency, purchase of the drug by Applicant over a thirteen year period, including Applicant's criminal involvement in the distribution/sale of marijuana in 1994, disqualifying condition (DC) 1 (any drug abuse) and DC 2 (illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution) raise security concerns that are deemed disqualifying. Even though Applicant has stated he does not intend to use marijuana or any other drug in the future, insufficient time has passed to find in Applicant's favor concerning his marijuana abuse.

On the other hand, while Applicant's use of the cocaine and Ecstasy also comes within the purview of DC 1, Applicant's use of those drugs is extenuated by the second mitigating condition (MC) 2, or infrequent nature of the use, coupled with passage of about 3 years since his last use of either drug. Though Applicant's abuse of LSD was more frequent than his use of cocaine and Ecstasy, and he purchased LSD twice a year, there is no evidence indicating any additional purchases of LSD after 1999.

### **Personal Conduct**

Conduct involving questionable judgment, dishonesty, and rules violations may indicate he person may not properly safeguard classified material. Applicant exercised poor judgment when violated the military regulations (DC 5) for being absent without leave in January 1992. Applicant's adverse personal conduct extends to his submission of false answers to questions 27 and 29 of his security questionnaire in July 2001 (DC 2), and when he intentionally provided false information in a sworn statement in March 2002. (DC 3)

The personal conduct guideline lists three mitigating conditions which may reduce the security concerns of intentional falsifications. Having examined the evidence carefully, none of the conditions can be employed in Applicant's favor. An applicant's past drug use is important in assessing judgment and trustworthiness under MC 1. Applicant's attempt to conceal his drug involvement removes MC 1 from consideration.

An applicant may successfully employ MC 2 to intentional falsifications when he can show the falsification was an isolated incident, and he subsequently provides the missing information voluntarily. Since Applicant provided false information on his security questionnaire in July 2001, and also in March 2002, and did not come forward with the true account of his drug involvement until confronted in the April 2002 interview/ sworn statement, MC 2 is not available to mitigate his falsifications.

Given the surrounding facts and circumstances of Applicant's disclosure of his drug history, MC 3 is not available to mitigate Applicant's falsifications. Although Applicant finally revealed his drug history in a sworn statement in April 2002, he did not do so until asked to disclose the extent of his drug history.

There are no corresponding mitigating conditions for rule violations under DC 5 of the personal conduct guideline. Therefore, it is reasonable to examine the surrounding circumstances for evidence which could explain the circumstances of his violation or other evidence which may shed light on the issue. As there is no evidence explaining why the offense occurred, the focus turns to whether there were any other adverse rule violations in Applicant's career to demonstrate a pattern. Since the record shows no other crimes or disciplinary events occurring in his career, attention is directed to any significant events during or at the conclusion of his military career. Applicant's discharge record shows a Good Conduct Medal and also participation in conflict in 1990. In light of Applicant's citations and his discharge under Honorable Conditions, I find for Applicant under 2.a.

### **Criminal Conduct**

A history or pattern of criminal conduct creates doubts about a person's judgment. Applicant's intentional falsifications under the personal conduct guideline also constitutes felonious criminal conduct under 18 USC 1001, and meets the definition of DC 1 as indicating an admission of criminal conduct, regardless of whether the person was formally charged. The information Applicant intentionally omitted from his security questionnaire and sworn statement is material information the Government must have access to in order to make an informed decision about Applicant's security qualifications.

Mitigating conditions 1, 2, and 5 have potential relevancy to Applicant's intentional falsifications. However, MC 1 is not applicable to mitigate the dishonest conduct that occurred in March 2002. Furthermore, Applicant's falsifications in July 2001 and March 2002 establish a pattern of dishonest conduct outside MC 2 and MC 6.

Considering the evidence as a whole, Applicant has failed to satisfy his ultimate burden of persuasion under drug involvement, personal conduct, and criminal conduct.

Applicant's participation in the delivery of marijuana in June 1994 satisfies DC 2 of the criminal conduct guideline because he and another individual transported marijuana with the intent to sell the drug. While the probation citation proves Applicant had some difficulty completing the terms of his probation, the Court did not revoke his probation and impose at least the original 18 month sentence. Significantly, even though he pled guilty to the offense eight years ago, and admitted the offense in his answer to the SOR, Applicant repudiated the guilty plea as recently as March 2002. Although his Answer to the SOR indicates his admission to the crime, residual doubts still remain as to whether he accepts full responsibility for his criminal conduct in 1994. This doubt is resolved against Applicant.

In reaching my decision in this case, I have also considered the general factors of the whole person concept in Directive 5220.6.

### **FORMAL FINDINGS**

Formal Findings required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are:

Paragraph 1 (Guideline H): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e.(1) Against the Applicant.
- e.(2) Against the Applicant.
- f. For the Applicant.

g. For the Applicant.

Paragraph 2 (Guideline E): AGAINST THE APPLICANT.

a. For the Applicant.

b.(1) Against the Applicant.

b.(2) Against the Applicant.

b.(3) Against the Applicant.

b.(4) Against the Applicant.

c. Against the Applicant.

d.(1) Against the Applicant.

d.(2) Against the Applicant.

d.(3) Against the Applicant.

d.(4) Against the Applicant.

Paragraph 3 (Guideline J): AGAINST THE APPLICANT.

a. Against the Applicant.

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 Applicant a security clearance.

Paul J. Mason

Administrative Judge

1. Pursuant to the terms of the original order of probation dated August 30, 1994, Applicant's probation could have been revoked and the Court was authorized to impose any sentence which it might have imposed before placing Applicant on probation.