

DATE: October 29, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-13164

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant was less than candid with the Government as to his 1994 felony charge, and as to his past drug abuse, when he executed his April 2000 Security Clearance Application (SCA). This wilful falsification is a violation of 18 U.S.C. Section 1001. Clearance is denied.

**STATEMENT OF THE CASE**

On June 19, 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, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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.

Applicant filed an Answer to the SOR on June 26, 2002.

The case was received by the undersigned on August 29, 2002. A notice of hearing was issued on September 9, 2002, and the case was heard on October 8, 2002. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence. The transcript was received on October 16, 2002. The issues raised here are whether the Applicant's personal conduct, related criminal conduct and alleged rule violation, militate against the granting of a security clearance.

**FINDINGS OF FACT**

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 38 years of age, has an Associate Degree, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

## Guideline E - Personal Conduct & Guideline J - Criminal Conduct

1.a. and 2.a. In answering **question 21** on his April 2000 SCA, the Applicant knowingly and wilfully failed to disclose that he had been charged with Debit Card Abuse, a third degree felony, in August of 1994 (Transcript (TR) at page 26 lines 3~20, at page 25 line 25 to page 34 line 11 Government Exhibit (GX) 4 at page 5, and GXs 5 and 7). This lack of candor is a violation of 18 U.S.C. Section 1001.

1.b. In answering **question 24** on his April 2000 SCA, the Applicant failed to disclose a 1994 **charge** for Public Intoxication and a 1994 **drug related charge** (GX 4 at page 6). About "eight weeks" prior to his security clearance hearing, he was appraised for the first time that he had, in fact, been **charged** with the Public Intoxication, thus he could not know to disclose it two years earlier (TR at page 26 line 21 to page 27 line 11, and at page 34 line 14 to page 37 line 8). The drug related charge was in conjunction with a 1994 weapons charge, which the Applicant thought was the gravamen charges against him, and which he fully disclosed in responding to question 21, above (*id*). I find the Applicant's failure to fully disclose the drug related charge an honest oversight on his part, and not a wilful falsification.

1.c. and 2.a. In answering **question 27** on his April 2000 SCA, the Applicant knowingly and wilfully failed to disclose any of his past drug abuse (TR at page 27 lines 12~21, at page 37 line 11 to page 40 line 14, and GX 4 at page 6). He used marijuana, cocaine and crystal methamphetamine, with varying frequency, from about 1993~1994 (TR at page 43 line 3 to page 46 line 11). This lack of candor is also a violation of 18 U.S.C. Section 1001.

1.d. In a signed sworn statement, executed by the Applicant on January 17, 2002, the Applicant states that he withdrew \$40 from an ATM machine using his girlfriend's debit card, but with her permission (TR at page 27 line 22 to page 28 line 10, at page 41 line 17 to page 43 line 2, and GX 1 at page 3). He disputes the fact that he did not have her permission (*id*), and his averment is supported by the fact that the related allegation of Debit Card Abuse was dismissed (GX 7). He, in fact, withdrew \$100, but he honestly remembered the withdraw as being only \$40 (TR at page 27 line 22 to page 28 line 10, and at page 41 line 17 to page 43 line 2). I find no wilful falsification, here.

1.e. and 3.a. The Applicant copied games, music and other software from the Internet, and also copied software products (TR at page 28 lines 11~19, and at page 46 line 12 to page 49 line 25). The Applicant does not believe that his conduct was illegal or violative of any rules or regulations at his workplace, and there is no showing that this conduct was, in fact, illegal or violative of any such rules or regulations (*id*).

### Mitigation

The Applicant's first and second level supervisors think highly of his integrity and skills (Applicant's Exhibit (AppX A at pages 1 and 2). He has also received numerous awards from his employer (AppX at pages 3~15).

## **POLICIES**

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither 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 clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

### 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 . . .;

#### Conditions that could mitigate security concerns:

None.

### Criminal Conduct

#### Condition that could raise a security concern:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

#### Conditions that could mitigate security concerns:

None.

### Misuse of Information Technology Systems

#### Conditions that could raise a security concern:

None

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, 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 that are speculative or conjectural in nature.

The Government must make out a case under Guidelines E (personal conduct), J (criminal conduct) and Guideline M (misuse of information technology systems); 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 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 be repeated, and that the Applicant presently qualifies for a security clearance.

Unacceptable personal conduct is conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law, there then exists the possibility that an applicant may demonstrate the

same attitude towards security rules and regulations.

## CONCLUSIONS

The Applicant was less than candid with the Government as to a 1994 felony charge, and as to his past drug involvement on his April 2000 SCA. The Applicant did not fully disclose this derogatory information until he executed a sworn statement in January of 2002, nearly two years later. Although I find that in his sworn statement he was candid as to his 1994 withdrawal from his girlfriend's ATM, Mitigating condition 3 under Personal Conduct has not been satisfied, as it requires that the Applicant make "prompt, good-faith efforts to correct the falsification before being confronted with the facts." Such was not the case here as to his felony charge and past drug abuse, as he disclose them only after being confronted 21 months later. His wilful falsification is also a violation of 18 U.S.C. Section 1001. Subparagraphs 1.a., 1.c. and 2.a. are found against the Applicant.

As to what laws, rules or regulations the Applicant may have violated in copying games, music and other software, I can find none, and the Government has offered none. Subparagraphs 1.e. and 3.a. are therefore found for the Applicant

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his personal and related criminal conduct. The Applicant has thus not met the mitigating conditions of Guidelines E and J, and of Section E.2.2.. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline E and J.

## FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. For the Applicant.
- c. Against the Applicant.
- d. For the Applicant.
- e. For the Applicant.

Paragraph 2: AGAINST THE APPLICANT

- a. Against the Applicant.

Paragraph 3: FOR THE APPLICANT

- a. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

## DECISION

In light 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 the Applicant.

Richard A. Cefola

Administrative Judge