

DATE: November 12, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22275

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of drug abuse between 1968 and 1998. He has not used any illegal substances since then and does not intend to use them in the future. Applicant also omitted a conviction as a youthful offender and a drug conviction from his security clearance application. However, Applicant reported that he had been convicted of a felony, been convicted of a drug offense, and resigned a job under unfavorable conditions. Under the whole person concept, it is clearly consistent with the national interest to grant him a clearance. Clearance is granted.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 29 July 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) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 15 September 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 3 October 2003. On 30 October 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. At the hearing, I granted the department counsel's motion to amend ¶¶ 2.a. and 2.b. to reflect that Applicant had answered "yes" to questions 2.a. and 2.b., but failed to list all of his felony and drug convictions. I also granted the department counsel's motion to withdraw the allegations contained in ¶¶ 2.c. and 2.d. DOHA received the transcript (Tr.) of the proceeding on 10 November 2003.

### **FINDINGS OF FACT**

Applicant is a 51-year-old laborer for a defense contractor. He has a ninth-grade education.

In December 1968, Applicant, then 17 years old, was arrested for and charged with felony robbery and possession of a dangerous weapon. Applicant was convicted of the offenses and sentenced to five years' probation. He was classified as

a youthful offender. The judge told him the charges would never show up on any of his records and that he would not have to disclose it. Ex. 2 at 1.

Applicant started smoking marijuana on weekends in 1968 when he was 17 years old. From August 1984 to November 1994, Applicant used crack cocaine nearly every day. Ex. 2 at 2. At times, he would go to work under the influence of cocaine. Tr. 25. In the mid-1980s, Applicant spent two weeks as an in-patient at a drug rehabilitation program. Tr. 27. After his release, he returned to using cocaine. A year later, he spent more time at the rehabilitation program with similar results. Tr. 28.

In November 1994, Applicant purchased crack cocaine while a sting operation was taking place. He was charged with possession of cocaine. He was convicted and sentenced to community service. He was told if he stayed out of trouble the charge would be dropped. Ex. 2 at 2.

In approximately 1995, Applicant was arrested for possessing crack cocaine on the job at a city housing authority site where he worked. Applicant pled guilty to, and was convicted of, possession of the cocaine. He was again sentenced to five days' community service after which, if he stayed out of trouble, the charges would be dropped. Ex. 2 at 2.

On 9 January 2001, Applicant completed his security clearance application (SCA) in which he certified his answers were true, complete, and correct to the best of his knowledge and belief. Ex. 1 at 8-9. Applicant answered "yes" to the following questions on the SCA:

21. Have you ever been charged with or convicted of any felony offense?

24. Have you ever been charged with or convicted of any offenses related to alcohol or drugs?

In explanation of his "yes" answer to question 21, Applicant listed only his 1994 arrest and conviction. He failed to list his convictions in 1968, for robbery and possession of a dangerous weapon, and his 1995/96 conviction for possession of cocaine. In explanation of his "yes" answer to question 24, Applicant listed his 1994 arrest and conviction for possession of cocaine, but failed to list his 1995/96 arrest and conviction of possession of drugs.

## 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 (DC) and mitigating conditions (MC) 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 Applicant used cocaine from August 1984 to July 1998 (¶ 1.a.), used marijuana in 1968 (¶ 1.b.), used crack cocaine nearly every day from August 1984 to November 1994 (¶ 1.c.), and sought drug abuse counseling (¶ 1.d.). The illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A2.1.1.1.

Applicant has a long history of drug abuse (DC E2.A8.1.2.1.) that included illegal drug possession (DC E2.A8.1.2.2.). As Applicant stopped using drugs in 1998, his drug involvement was not recent. MC E2.A8.1.3.1. Applicant demonstrated an intent not to abuse any drugs in the future. MC E2.A8.1.3.3. Although Applicant had a difficult time with drugs, he has been clean for five years, he no longer lives in the same city, and no longer has friends who use drugs. The likelihood of recurrence is remote. *See* Directive ¶ 6.3.6. After considering all of the evidence, I conclude the mitigating conditions outweigh the disqualifying conditions. Finding is for Applicant.

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant deliberately falsified his answers to his SCA questions 21 regarding being charged with or convicted of any felony offense (¶ 2.a.), question 24 concerning whether he had ever been charged with or convicted of any alcohol or drug offenses (¶ 2.b.), question 19 concerning whether he had ever consulted a mental health care provider about a mental health related condition (¶ 2.c.), and question 27 concerning whether he had illegally used any controlled substance in the previous seven years (¶ 2.d.). 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. Directive ¶ E2.A5.1.1.

Applicant omitted relevant and material information from his SCA. He failed to list his conviction as a youthful offender for robbery and possession of a dangerous weapon in 1986 and his conviction for possessing cocaine on the job in 1995/96. The question is whether the omissions were deliberate. *See* DC E2.A5.1.2.2. Both of the questions Applicant failed to fully answer contain a requirement that applicants report information "whether the record in your case has been sealed or otherwise stricken from the record." On the other hand, Applicant credibly testified the judge told him after his conviction as a youthful offender that he "didn't have to disclose that." Tr. 14. Applicant did list a felony conviction and did list a conviction for drugs. In answer to question 20, he noted that he resigned his job at the city housing authority "under unfavorable conditions." Ex. 1 at 5-6.

Under the whole person concept, a judge must avoid a piecemeal analysis of an applicant's conduct and circumstances. ISCR Case No. 000628 at 5 (App. Bd. 2003). After carefully weighing all of the evidence, I conclude the omissions were not deliberate attempts to mislead investigators or the Department of Defense about his past. Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Applicant's motivation was not to hide his drug use or criminal record from the Department of Defense. *See* Directive ¶ 6.3.4. I consider the likelihood of recurrence extremely remote. Directive ¶ 6.3.6. Under the whole person concept, this Applicant demonstrated it is in the national interest to grant him a clearance. Finding is for Applicant.

## FORMAL FINDINGS

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

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

Subparagraph 2.c.: Withdrawn

Subparagraph 2.d.: Withdrawn

### **DECISION**

In light of all of the circumstances 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 granted.

**James A. Young**

**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.