

DATE: April 15, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-25676

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Rita O'Brien, Esq., Department Counsel

**FOR APPLICANT**

Thomas Albin, Esq.

**SYNOPSIS**

Having warned her daughter repeatedly about the dangers of illegal drug use, Applicant gave in to her curiosity and snorted cocaine on one occasion at a party in September 2001. At the time employed at a nuclear power facility where she required clearance for access to sensitive areas, Applicant tested positive for cocaine during a random test conducted on her return to work after the weekend. She lost her clearance and could no longer work at the nuclear power plant. Even worse for Applicant, she had to admit to her daughter that she might lose her present job because of the illegal drug involvement. Applicant deeply regrets her cocaine use and has no intent to use any illicit drug in the future. Clearance is granted.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated November 14, 2002, to the 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on illegal drug involvement (guideline H) due to Applicant's use of cocaine on one occasion in September 2001, confirmed by a positive drug test at her place of employment, and on personal conduct (guideline E) because she used the cocaine while she had a security clearance for her duties at a nuclear power plant.

On November 25, 2002, Applicant responded to the allegations set forth in the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on January 14, 2003, and pursuant to formal notice dated January 29, 2003, a hearing was scheduled for February 26, 2003. At the hearing, which was held as scheduled, two Government exhibits were entered into the record and testimony was taken from the Applicant, her boyfriend, and her

supervisor. With the receipt on March 7, 2003, of the transcript of the proceedings, this case is ripe for a decision.

## FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 37-year-old pipefitter employed by a defense contractor (company A), most recently since June 2002. She seeks to retain a confidential security clearance which she has held since her rehire.

In April 1986, Applicant commenced employment as a pipe hanger for company A. A single mother with primary support for a young daughter, Applicant began dating a coworker in 1996. Within a year, they became cohabitants.<sup>(1)</sup> After eleven years at the company, Applicant was laid off in April 1997. She worked thereafter as an assembler and then as a mold injection machine operator until January 2000, when she was hired to perform general onsite maintenance at a local nuclear power station. In February 2001, Applicant was hired by a subcontractor at the nuclear facility to perform decontamination duties. Responsible for the cleanliness of one of the units at the power plant, Applicant was tasked with ensuring that radioactive leaks were cleaned up so that they did not spread throughout the unit. Granted a security clearance for her duties at the power plant, Applicant was subject to random drug testing.<sup>(2)</sup>

Over Labor Day weekend in September 2001, Applicant went to a party held at the residence of an acquaintance. Since her boyfriend was working on a car at the local race track, Applicant went alone to the party where she met up with some close friends. At the gathering, Applicant consumed three beers to the point where she felt a little "buzz."<sup>(3)</sup>

While she was under the influence of alcohol, she was offered some cocaine by individuals she knew but did not normally socialize with. Having "preached" repeatedly to her daughter about the dangers of illegal drugs, Applicant initially denied the offer. Asked again whether she was sure about her rejection of the offer, Applicant, curious about the effects of the drug, snorted two lines of cocaine. She stayed at the party for a couple of hours thereafter before leaving.

On return to work after the long weekend, Applicant was told she had been selected for a random drug test. Approximately one week later, her urinalysis test came back positive for cocaine. Applicant did not challenge the results, as she had snorted cocaine at the party. Due to the positive result, her security clearance was revoked, which meant she could no longer work at the nuclear power site. Her employer offered her another position in another state. Applicant declined the offer because of the distance, and she resigned from her employ. Applicant was candid with her boyfriend about the reasons she left the job, but she told all of her friends that she had been laid off, as she was embarrassed by her cocaine use and did not want her friends to know of her illegal drug involvement.

Applicant increased her hours as a bartender at the local VFW hall, where she had been working on a part-time basis since June 1999. Having received a postcard from company A asking her whether she wanted to return to work for the defense contractor, Applicant did not increase her hours to full-time, as she did not want the VFW to have to find someone to fill all those hours if she returned to work for company A.

Hoping to be rehired by the defense contractor, Applicant executed a security clearance application (SF 86) on March 19, 2002, on which she disclosed she had left her job with the subcontractor at the nuclear plant in September 2001 because her clearance had been revoked. Applicant responded "Yes" to inquiries into whether she had used any illegal drugs since age 16 or in the last seven years (question 27), and whether she had ever used a controlled dangerous substance while possessing a security clearance or while in a position directly and immediately affecting public safety (question 28), indicating her one time use of cocaine in September 2001.

On May 29, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about her use of cocaine, intoxicating beverages, alcohol-related arrests, and counseling. Applicant admitted to one-time use of cocaine, which was at the Labor Day party in 2001 after she had consumed approximately three beers. Applicant discussed her positive drug test and consequent loss of her clearance, which left her unable to work at the nuclear power plant. Acknowledging it was poor judgment on her part to have used the cocaine, she expressed regret at her use of cocaine and denied any intent to use any illegal drug in the future. Although her friends did not know about her involvement with cocaine and she preferred that they not become aware, Applicant denied she was susceptible to blackmail. As for

her alcohol use, Applicant related that since her May 1991 drunk driving arrest, she had consumed two or three beers weekly on average, at bars, auto races and parties, which she intended to continue.

As a precondition to her employment at company A, Applicant was required to submit to a urinalysis, which was negative for all substances tested. <sup>(4)</sup>

Rehired by company A and granted a confidential security clearance for her new duties as a pipefitter, Applicant returned to work for the defense contractor in June 2002. Applicant's present supervisor became acquainted with Applicant during her previous employ as a pipe hanger at the company. He has not seen any indications of poor job performance on her part and has found her to be an excellent worker.

On review of Applicant's eligibility for security clearance, DOHA was unable to find that it is clearly consistent with the national interest to grant Applicant access. On November 14, 2002, DOHA issued an SOR to Applicant alleging illegal drug involvement and personal conduct concerns because of her use of cocaine in September 2001 while she had a clearance for her work at the nuclear power plant. Applicant exhibited such worry about the possible loss of her confidential clearance and defense contractor employment that her daughter, who is twelve-years-old, asked her repeatedly about the reason for her concern. Circa late January 2003, in what proved to be an emotional session for both, Applicant told her daughter she could lose her job because she had used cocaine. <sup>(5)</sup>

In early February 2003, Applicant asked her supervisor to testify at her upcoming security clearance hearing. She informed him that before he agreed, he had to know that the Government's concerns related to her one-time use of cocaine at a Labor Day party in September 2001. This supervisor supports Applicant's application for continued access as he believes she used cocaine only once and she knows she made a mistake. Due to shame and embarrassment, as of late February 2003, Applicant had not told her friends about her cocaine use. She would rather that her friends not know she had used cocaine.

Applicant's boyfriend, who is 39 years old, has not used illegal drugs in twenty years. He smoked marijuana when he was around eighteen years of age. He was "shocked" when Applicant told him she had snorted cocaine, as he has never seen Applicant use an illegal drug.

Applicant realizes it was poor judgment on her part to have used cocaine, and she deeply regrets it. She does not intend to use any illicit drug in the future, and to that end avoids parties and bars where others might be engaged in illegal drug use. Applicant continues to consume alcohol on occasion, imbibing one or two beers when she does drink.

### POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, 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 which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. 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 criterion 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 emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

## **Drug Involvement** <sup>(6)</sup>

The Concern:

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.

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

a. Any drug abuse (see above definition)<sup>(7)</sup>

e. . . .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.

Conditions that could mitigate security concerns include:

a. The drug involvement was not recent

b. The drug involvement was an isolated or aberrational event

c. A demonstrated intent not to abuse any drugs in the future

## **Personal Conduct**

E2.A5.1.1. The Concern: 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 . . .

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress

\* \* \*

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In

addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue her security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

### CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines H and E:

Concerning illegal drug involvement, guideline H, Applicant snorted two lines of cocaine at a party in September 2001, while she held a security clearance for her duties as a "deconner" at a local nuclear power facility. Any drug abuse is potentially security disqualifying under the adjudicative guidelines (See DC a.), as it raises questions regarding an individual's willingness or ability to protect classified information. When one is under the influence of a mood-altering substance such as cocaine, whether on duty or off, there is an increased risk of unauthorized disclosure of classified information.

As noted by Department Counsel at the hearing, recent drug involvement, especially following the grant of a security clearance, is viewed as sufficiently serious to "almost invariably" warrant an unfavorable determination (*See DC e.*). At the time the SOR was issued in this case, fifteen months had passed since Applicant's use of cocaine. Any determination as to recency must necessarily take into account the extent of use (duration and frequency) as well as the passage of time since last involvement. Applicant's use of cocaine was aberrational in nature, due in part to curiosity and to opportunity. There is no evidence Applicant sought out the cocaine she used at the party, or that she had ever even attempted to purchase an illegal drug. Applicant testified that had she been required to pay for the cocaine offered to her at the party, she would not have used it. Although not condoned, her one-time use of cocaine at a party more than twelve months ago is not viewed as recent. Mitigating conditions (MC) a. (drug involvement was not recent) and b. (drug involvement was an isolated or aberrational event) apply in this case.

Citing the impact that limited drug involvement had on her life, Applicant submits she does not intend to use any illegal drug in the future. For mitigation under MC c. (a demonstrated intent not to abuse any drugs in the future), there must be concrete actions in reform. Applicant's use of cocaine is especially troubling as it occurred after she had repeatedly preached to her daughter about the dangers of drug use, and when she was with individuals outside of her normal social circle. Yet, as someone who has paid dearly for the exercise of poor judgment at that party, Applicant is committed to avoiding even those situations (parties, "the bar scene") where drugs might be used. After the positive drug test, Applicant was ineligible to work onsite at the nuclear power plant. With her personal situation prohibitive of extensive travel, Applicant had little choice but to decline a position with her employer out of state and resign from her job. Worse for her than the economic loss, Applicant had to tell her twelve-year-old daughter that she had used cocaine. Clearly concerned that her daughter no longer looks at her in the same way, Applicant testified convincingly to not wanting to disappoint her daughter again.

Also conducive to continued abstinence, neither Applicant's close friends nor her boyfriend use illegal drugs. Applicant's boyfriend testified he has not been involved with any illicit substance since he smoked marijuana at about age eighteen. As of the hearing, Applicant had not told her friends about her drug use out of embarrassment. It can reasonably be inferred that Applicant would not be so concerned about her cocaine use becoming common knowledge if her friends were drug users themselves. Applicant's desire to retain her defense-related employment at company A serves as a significant deterrent to any future illegal drug use. Applicant's current pattern of drinking one or two beers on occasion is not seen as increasing the risk of illegal drug involvement where Applicant consciously avoids those situations where drugs are likely to be present. Favorable findings are warranted as to subparagraphs 1.a. and 1.b., as there is little likelihood, if any, of Applicant being involved with a controlled dangerous substance in the future.

With respect to guideline E, personal conduct, Applicant admits she exercised extremely poor judgment when she used cocaine off-duty, while she held a security clearance for her duties at a nuclear power plant. Applicant recognizes the gravity of her mistake and is committed to not repeat it. Personal conduct concerns may nonetheless persist if the conduct reflective of poor judgment (in this case drug use) increases an individual's vulnerability to coercion, exploitation or duress (*See* E2.A5.1.2.4.).<sup>(8)</sup> In an effort to avoid potentially embarrassing admissions of cocaine use, Applicant told her friends she had been laid off from her job at the nuclear power plant. Applicant's lack of candor with her friends is relevant in assessing whether her representations can be relied on, but more significant in this regard is the extent to which Applicant has been frank with the Government concerning her cocaine involvement and related job loss. On her SF 86, during her DSS interview, and at her security clearance hearing, Applicant disclosed her September 2001 use of cocaine and related loss of her position at the nuclear power facility. There is no issue of deliberate falsification to the United States Government.

Although Applicant's friends remain unaware of the real reason for the loss of her job at the nuclear site, Applicant has significantly reduced her vulnerability to coercion, exploitation or pressure by informing those closest to her (primarily her daughter and boyfriend) of her use of cocaine at the party in September 2001. As confirmed by her boyfriend, Applicant told him about it in 2001 when she was no longer allowed to work at the nuclear plant. Outwardly concerned about her security clearance hearing and the possible loss of her job, Applicant in about late January 2003, in a very painful and emotional session, disclosed to her daughter that she had used cocaine. When Applicant asked her supervisor to testify on her behalf at her security clearance hearing, she informed him of her drug use at the party in September 2001. Subparagraph 2.a. is resolved in Applicant's favor, as the personal conduct concerns have been mitigated.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline H: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

### **DECISION**

In light of all 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.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. Applicant's boyfriend is currently employed by a construction company. He began dating Applicant when both were working at company A as pipe hangers in 1996. Cohabitants since about 1997, Applicant's daughter lives with them.

2. It is not clear what level of security clearance Applicant held for her duties as a "deconner," or even whether it was a clearance granted by the Department of Defense or the Department of Energy. Applicant indicated on her SF 86 that she had been granted a clearance by the Department of Defense in January 2000. Yet, at her hearing, she was uncertain whether she held a DOD or DOE clearance. (*See transcript p.60*).

3. Applicant's consumption of a similar amount of alcohol led to her arrest on drunk driving charges in September 1986 and in about May 1991. (*See Ex. 2*). The Government did not allege alcohol consumption as raising a security concern. However, since Applicant was under the influence of alcohol when she used cocaine, it must be determined whether her present drinking habits increase the risk of future involvement with illicit drugs.

4. Although the results of the drug test are not of record, it is highly unlikely Applicant would have been allowed to return to work for the defense contractor if the results had been positive.

5. Applicant was visibly upset at the hearing after testifying as follows:

I told her, I said that I might lose my job because I used drugs, and I was real worried about what she was going to think because for years, she graduated from the DARE Program and all that, and she put her arms around me and said, don't worry mommy, I still love you.

(*See transcript p. 42*).

6. The adjudicative factors considered most pertinent under drug involvement are identified as set forth in the Directive following the implementation of 10 U.S.C. §986. For example, the disqualifying condition for any drug abuse is cited as DC a. as opposed to E2.A8.1.2.1.

7. Under the provisions of 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.

8. In using the cocaine, Applicant violated the trust placed in her by the grant of clearance. However, there is no pattern of rule violations, which is required under E2.A5.1.2.5.