

DATE: November 13, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26226

## **DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's occasional drug involvement from 1992 to April 2000, then one-time cocaine use in May 2002, raises a security concern that is mitigated by independent evidence supporting Applicant's statement he has not used drugs since May 2002, and will not use drugs in the future. Applicant's failure to comply with a police order in August 1999 is extenuated by Applicant being under the influence of alcohol and the passage of four years without a similar offense. Applicant's one-time use of cocaine in May 2002, after completing a security clearance questionnaire, does not constitute a rule violation when there is no evidence he was placed on notice of what the rule was. Clearance is granted.

### **STATEMENT OF CASE**

On January 31, 2003, 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 February 13, 2003. Applicant elected to have his case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on September 15, 2003. Applicant received the FORM on October 7, 2002. His response was received by the undersigned for decision on October 29, 2003.

### **FINDINGS OF FACT**

The SOR alleges drug involvement and personal conduct. Applicant admitted all allegations without explanation. Applicant, 30 years old, is employed as a project engineer for a defense contractor. He seeks a secret clearance.

**Drug Involvement.** In response to question 24 (drug question) of his security clearance application (SCA) dated October 3, 2001, Applicant indicated he used marijuana and cocaine several times from January 1992 to April 2000. He also noted he had been taking prescribed medication for a mental condition since September 1995. According to his sworn statement dated June 5, 2002, Applicant used marijuana provided at parties and/or provided by others after school. Applicant characterized his marijuana use as occasional or about 30 times in high school and college. He stopped using marijuana in approximately Spring 2000.

Applicant's cocaine use began in 1994 or 1995. He used the drug about 30 times until April 2000. Occasionally, he contributed toward purchase of the drug. Applicant used cocaine one time in May 2002 while on vacation between assignments. In describing his regret for the cocaine use in May 2002, Applicant stated, "[N]ow realizing how serious of an issue this matter is, I will not use illegal drugs in the future." (Item 5, sworn statement) Applicant observed that his marijuana and cocaine use had never resulted in treatment. He had never been involved in trafficking or distribution of any illegal drugs. Finally, he opined his past drug use could not be utilized to influence him to act in a manner contrary to the interests of the US.

**Personal Conduct.** Applicant used cocaine in May 2002 after completing an SCA on October 3, 2001, to obtain a Department of Defense Secret security clearance.

On August 14, 1999, Applicant was attending a going away party given by coworkers. Everybody was drinking. One of the party participants drove a three-wheeled motorcycle through the neighborhood and struck a telephone pole. Several police officers responded to the accident. While the police were investigating, one of the police officers became angry with Applicant and attempted to grab him when Applicant did not comply with a command to reposition himself; when Applicant pulled away suddenly, he was arrested for (1) obstructing police - interference, (2) resisting a police officer, and (3) disturbing the peace. While allegation 2.b. of the SOR indicates Applicant pled guilty to obstructing police - interference, Applicant stated he probably pled guilty to resisting arrest and paid a fine. Applicant noted this offense in his SCA. (Item 4)

**Character Evidence.** On October 9, 2003, a doctor examined Applicant and saw no signs of drug abuse. Next, the doctor gave Applicant a drug test which produced negative results for drugs.

On October 10, 2003, the project engineer considered Applicant to be a diligent and dependable employee based on 13 months of observation. Being responsible for Applicant's conduct at work and away from work, the project engineer could not recall Applicant ever committing an infraction away from work.

Applicant provided a list of job assignments, references and responsibilities.

The project director expressed approval of Applicant's trustworthiness and reliability as well as his technical knowledge.

The construction manager acknowledged his satisfaction over Applicant's competence and professional attitude on the project.

Applicant's former team leader worked with Applicant for 15 months from May 2002 to September 2003, and found him to be a hardworking, deserving candidate for a position of trust. The team leader never saw Applicant use drugs either at or away from work.

## **POLICIES**

Enclosure 2 of the Directive sets forth policy disqualifying conditions (DC) and mitigating conditions (MC) which must be given binding consideration in making security clearance decisions. These conditions must be considered in every case according to the pertinent guideline; however, the conditions 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 conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

## **Drug Involvement**

### Disqualifying Conditions (DC):

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

### Mitigating Conditions (MC):

1. The drug involvement was not recent;
2. The drug involvement was an isolated or aberrational incident;
3. A demonstrated intent not to abuse drugs in the future.

## **Personal Conduct**

### Disqualifying Conditions (DC):

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 (MC):

Since there are no corresponding mitigating conditions under personal conduct for rules violations, DC 5 may be mitigated by the general factors of the whole person concept.

## **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; (8) the potential for pressure, coercion, exploitation, or duress, and (9) 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 a prima facie case under drug involvement (Guideline H), and personal conduct (Guideline E) which establishes doubt about a person's judgment, reliability, and trustworthiness. Then, the Applicant must remove that doubt with 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.** Improper or illegal drug involvement can impair social or occupational functioning, increasing the risk of security violations or even unauthorized disclosure of classified information. Marijuana and cocaine are mood and behavior-altering drugs. Applicant's marijuana and cocaine abuse falls within DC 1 of the drug involvement guideline. Applicant used marijuana about 30 times from the early 1990s to Spring 2000. He also used cocaine about 30 times from 1994 to May 2002. Applicant's cocaine abuse is aggravated by the fact he purchased the drug on occasion.

There are three relevant mitigating conditions which may remove the security concerns attached to Applicant's drug use. MC 1 may be applicable when the record reflects the drug abuse was not recent. Because Applicant abused cocaine less than two years ago, he can receive very little mitigation under MC 1. MC 2 may mitigate when the drug involvement was an isolated event. Even though Applicant's use of marijuana and cocaine about 60 times between 1992 and May 2002 removes MC 2 from consideration, the presence or absence of any mitigating condition does not determine the ultimate issue of whether Applicant has met his ultimate burden of persuasion under the drug involvement guideline, specifically the period from April 2000 and May 2002 when Applicant used no drugs.

MC 3 of the drug involvement guideline requires a demonstrated intent not to use any illegal drugs in the future. Considering Applicant's eight year history of drug use between 1992 and 2000, then one-time use of cocaine again in May 2002 after submitting his SCA in October 2001 to obtain a security clearance, he bears a heavy burden of persuading me he will remain drug-free. In addition to simply stating an intention to be drug-free, an Applicant must show through his conduct he has made the appropriate adjustments to facilitate his drug free future. Even though the SCA does not specifically state in bold letters drug use is not to be tolerated by security clearance holders, the drug use questions should clearly provide a strong clue that any continued drug use would be a serious government concern. Question 23.a. requires disclosure of all kinds of illegal drug use in the past 7 years. Question 23.b. requires disclosure of illegal drug use while holding certain government jobs, or while holding a security clearance. Question 23.c. requires disclosure of illegal profiteering in drugs. A simple interpretation of the three questions should indicate to the applicant not to use drugs.

Though Applicant used drugs less than a year after he submitted his SCA, the credible language used in his sworn statement in June 2002 persuades me to believe he comprehends that future drug use will not be tolerated. Given (1) the favorable job performance evidence from his supervisors and coworkers, (2) his team leader's statement indicating he never saw Applicant involved in drug use between May 2002 and September 2003, and (3) the negative drug test results from October 2003, I conclude Applicant has demonstrated his intention to remain drug free in the future.

**Personal Conduct.** Applicant's resumption of drug use after furnishing his SCA in October 2001 constitutes poor judgment. However, his one-time use in May 2002 was quickly followed by his understanding of the government policy against drug use in June 2002 and independent evidence indicating he has not used drugs since May 2002.

Applicant's conduct during the altercation in August 1999 is extenuated because Applicant had been consuming alcohol at time. While he was slow to comply with police directions to separate himself from the confrontation, the police officer bears some responsibility in becoming unnecessarily agitated upon arrival at the party. In view of the passage of four years without similar conduct indicating a defiance of authority, I find Applicant's obstruction conviction extenuated. In reaching my findings for Applicant under the drug involvement and personal conduct guidelines, I have considered the general policy factors of the whole person concept.

### **FORMAL FINDINGS**

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

Paragraph 1 (Guideline H): FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.

Paragraph 2 (Guideline E): FOR THE APPLICANT.

a. For the Applicant.

b. 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 Applicant a security clearance.

Paul J. Mason

Administrative Judge