

DATE: June 15, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-02071

## **DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Department Counsel

#### **FOR APPLICANT**

Pro Se

### **SYNOPSIS**

In a Security Clearance Application (SCA) supplied to the Government, this thirty year old Applicant provided false and incomplete information by not admitting that he used cocaine and by greatly minimizing his usage of marijuana. He also committed criminal conduct by striking and seriously injuring his wife. Mitigation has not been shown. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 15, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued an SOR to Applicant. The SOR detailed reasons under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) 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 conduct proceedings and determine whether clearance should be granted or denied.

In a signed and sworn statement, dated November 4, 2003, Applicant responded to the SOR allegations. He requested that his case be decided on a hearing record.

On February 2, 2004, this case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on February 13, 2004, and the hearing was held on March 16, 2004.

At the hearing, Department Counsel offered four documentary exhibits (Government Exhibits 1 through 4), and no witnesses were called. Applicant offered two documentary exhibits (Applicant Exhibits A and B), and offered his own

testimony. All of the documents were entered into evidence without objection. The revised and corrected transcript (TR) was received on March 31, 2004.

## **FINDINGS OF FACT**

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. The SOR contains four allegations, 1.a. through 1.d., under Guideline H (Drug Involvement), two allegations, 2.a. and 2.b., under Guideline J (Criminal Conduct), and two allegations, 3.a. and 3.b., under Guideline E (Personal Conduct). Applicant admitted SOR allegations 1.a. through 1.d., 2.a. and 2.b., and he denied 3.a. and 3.b. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 30 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector. Applicant is married and has two sons.

### **Paragraph 1 (Guideline H - Drug Involvement)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has abused illegal substances. Applicant testified that he first experimented with marijuana in 1984, when he was 11 years of age. He estimated that he started using marijuana regularly in 1991, and he continued using it approximately 60 times a year until 1999, when he stopped his usage (Tr at 29, 30, Exhibit 2).

Applicant purchased marijuana on a monthly basis, during the years he was using it regularly, 1991 through 1999. He denies that he ever sold it (Exhibit 2).

Applicant also ingested cocaine at least 24 times from approximately 1991 to 1996 (Tr at 30, 31, Exhibit 2).

Applicant also purchased the cocaine that he used, paying approximately \$100, one or two times a year for the period of his usage, from 1991 through 1996. He denies that he ever sold cocaine. He also denies the usage, purchase, or sale of any other illegal substance (Exhibit 2).

### **Paragraph 2 (Guideline J - Criminal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he committed two criminal acts. On December 17, 1999, Applicant was involved in a physical altercation with his wife, wherein he struck her multiple times, resulting in serious physical injury to her. Applicant pled guilty to Domestic Violence and Harassment, and he was placed on 12 months probation. He was also ordered to undergo 36 weeks of counseling (Exhibits 1 and 2).

In 1992, Applicant was charged with Driving While Ability Impaired. He was ordered to attend alcohol abuse classes (Exhibits 1 and 2).

### **Paragraph 3 (Guideline E - Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government. Applicant completed a signed, sworn Security Clearance Application (SCA) on May 23, 2002. Question 27 of the SCA asked if, in the previous seven years, Applicant had used illegal drugs, including marijuana, etc. Applicant answered "yes" and responded, that between September 1991 and December 1999, he had used marijuana 60 times. Applicant did not list his use of cocaine (Exhibit 1).

His answer to the question in the SCA generated an interview with a Defense Security Service (DSS) agent. In a signed, sworn statement Applicant provided to the DSS agent, he admitted his more extensive use of marijuana and that he had used cocaine, as described above.

## **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of alcohol abuse and conduct that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be

a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

## **CONCLUSIONS**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in

the SOR:

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

**Paragraph 1 (Guideline H - Drug Involvement)** With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the purchase, possession, and use of marijuana, is of concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) E2.A8.1.2.1. (any drug abuse), and DC E2.A8.1.2.2. (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution).

Based on the fact that Applicant last used cocaine in 1996 and marijuana in December 1999, I conclude that Applicant's conduct comes within Mitigating Condition (MC) E2.A8.1.3.1., (the drug involvement was not recent)." MC E2.A8.1.3.3. also applies because of Applicant's stated intention not to continue using marijuana or cocaine in the future.

In this case, the Government has met its initial burden of proving by substantial evidence that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 1 Guideline H of the SOR is concluded for Applicant.

**Paragraph 2 (Guideline J - Criminal Conduct)** Regarding Guideline J, the Government has established Applicant's criminal conduct. Applicant's physical altercation with his wife in 1999 was extremely serious and severe. Applicant's criminal conduct falls within Criminal Conduct DC E2.A10.1.2.1. and DC E2.A10.1.2.2., because the violence perpetrated on Applicant's wife by him involved serious criminal conduct, for which he pled guilty. Based on the egregious conduct involved, I cannot conclude that any MC applies.

**Paragraph 3 (Guideline E - Personal Conduct)** With respect to Guideline E, the evidence establishes that Applicant provided less than complete information to the Government in response to question, #27, on the SCA that he executed on May 2002. Based on the admitted evidence, I conclude that when Applicant answered the SCA, he knowingly provide untruthful information by his failure to list his usage of cocaine and the full extent of his marijuana usage.

In reviewing the DCs under Guideline E, I conclude that DC E2.A5.1.2.3. applies because Applicant deliberately provided false and misleading information in his SCA. No MC applies in this paragraph. Applicant's conduct, considered as a whole, including his drug history, his criminal conduct, and the misinformation that he provided to the Government, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 3 Guideline E against Applicant.

On balance, it is concluded that Applicant has failed to overcome the Government's information opposing his request for a security clearance.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

Paragraph 3: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against 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 or continue a security clearance for the Applicant.

Martin H. Mogul

Administrative Judge