

DATE: July 15, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-02844

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

APPEARANCES

**FOR GOVERNMENT**

Juan Rivera, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant used illegal drugs for 18 years until January 2004. He also was arrested for misdemeanor drug possession in 1999 and twice charged with larceny by check in 1992 and 1993. He mitigated personal conduct concerns because the omission of his drug use from his security questionnaire was not an intentional effort to deceive the government. However, Applicant failed to mitigate the concerns about his drug use and his criminal conduct. Clearance is denied.

**STATEMENT OF THE CASE**

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On April 27, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct), Guideline J (criminal conduct), and Guideline H (illegal drugs). Applicant timely answered the SOR (Answer), admitted all of the allegations therein, and requested a hearing.

On January 11, 2005, I convened a hearing at which the government presented five exhibits (GE 1 - GE 5) to support the SOR. In response, Applicant testified in his own behalf. DOHA received the transcript (Tr) on January 21, 2005.

**FINDINGS OF FACT**

Applicant's admissions through his Answer are entered herein as facts. After a thorough review of the pleadings, transcript, and exhibits, I also find the following:

Applicant is 36 years old and works as an electro-optical engineer for a nationally-known defense contractor that hired him in August 2002. He is married and the father of two children ages 11 and 9.

In January 2002, Applicant moved from State A to his current residence in State B to be near his parents who are in their 60's. In the early 1990's, Applicant and his wife experienced financial difficulties following the birth of their first child. Applicant's medical benefits did not adequately cover the medical expenses and their bills began to pile up. In 1992 and 1993, Applicant bounced two checks for groceries. Both times he was charged with larceny by check, but made restitution and the charges were dismissed. (SOR ¶¶2.a and 2.b)

Applicant used marijuana with varying frequency for about 18 years until his last use in January 2004. When he was interviewed by a Defense Security Service (DSS) agent in November 2002, he stated he was at that time using marijuana on a monthly basis and would continue using the drug at that rate unless his use precluded getting his clearance. (SOR ¶¶1.a and 1.b) He also used hashish in 1999. (SOR ¶1.c) Following a traffic stop in April 1999, he was arrested for possession of hashish, a misdemeanor. The charge was dismissed after Applicant paid a fine and court costs. (SOR ¶1.d) Applicant stopped using marijuana when he moved to State B in early 2002, but resumed using the drug after he was hired by his current employer in August 2002.

As a condition of employment for his current position, Applicant was required to undergo a drug urinalysis test, which he apparently passed. Once he was hired, he submitted a security clearance application (SF-86) on August 27, 2002. By signing the form, he attested, under penalty of federal law, <sup>(2)</sup> that his answers to the questions in the form were, to the best of his knowledge and belief, true, complete, and accurate. In response to question 24 (alcohol- or drug-related criminal offenses), Applicant disclosed his 1999 arrest for drug possession. However, in response to question 27 (use of illegal drugs in the past seven years), Applicant omitted the fact he used marijuana by answering "no." (SOR ¶3.a)

After submitting his SF 86, Applicant received an interim security clearance pending the results of a background investigation. He held that clearance from late 2002 until early 2005, when it was revoked pending the outcome of this case. In response to the SOR, Applicant denied any intent to mislead the government about his drug use. In his defense, he asserts he must have misread question 27 and that his negative answer was a mistake. He also offers he may not have properly considered the question having not used marijuana since leaving State A.

When Applicant resumed using marijuana in late 2002, he held a security clearance, which allowed him to work on classified projects. <sup>(3)</sup> Applicant has not smoked marijuana since January 2004.

Subsequent to Applicant's November 2002 DSS interview, he submitted a written, sworn statement about his finances, his arrest record, and his drug use. The statement addressed his omission of a bankruptcy filing but did not address any omission of his past drug use. At hearing, Applicant testified he freely and fully disclosed his drug use to the DSS agent as a natural follow-on to their discussion about the 1999 drug arrest, which, as noted above, he disclosed on his SF 86.

When he submitted the statement to DSS, Applicant stated, "As for my future intentions for my uses of marijuana, I plan to maintain current patterns. I do not plan to change unless I am told that my use could costs (sic) me my job or security clearance. If this use of marijuana does cause a problem I will have no problem discontinuing this behavior." <sup>(4)</sup> Applicant has always known that marijuana use is illegal. However, he testified at hearing that, despite having been given a urine drug screening when hired for his current job, and even after his DSS interview and sworn statement about past drug involvement, he would not have been aware without being told that using marijuana was possibly disqualifying. <sup>(5)</sup> He now insists he has matured, that he fully appreciates the seriousness of illegal drug use by someone holding a security clearance, that drug use is no longer part of his life, and that he is concerned about the effect continued drug use may have on his children as they get older.

## POLICIES

The Directive sets forth adjudicative guidelines <sup>(6)</sup> to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they

represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct), Guideline H (illegal drugs), and Guideline J (criminal conduct).

### **BURDEN OF PROOF**

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(7)</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.<sup>(8)</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.<sup>(9)</sup>

### **CONCLUSIONS**

Under Guideline H, 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. Such conduct may also be criminal and indicative of a disregard for rules and regulations used to protect national interests.<sup>(10)</sup> The government has presented sufficient evidence, through Applicant's admissions to the SOR, his testimony, and his prior statement to DSS, to establish Applicant illegally used marijuana from high school until January 2004, a period of about 18 years. (SOR ¶1.a) Available information also shows Applicant used hashish in 1999 and was arrested that year for illegal possession of hashish, for which he paid a fine and court costs. (SOR ¶¶1.c and 1.d)

Applicant has denied the SOR allegation that he plans to continue using marijuana (SOR ¶1.b). However, the government established through Applicant's statement to DSS that Applicant would, unless specifically advised it would be inconsistent with the requirements of his job or his clearance, continue using marijuana at least monthly. Applicant now insists he will no longer use drugs because he now understands the professional and personal ramifications of illegal drug use. I do not find his assertions persuasive. Applicant has always known that using marijuana is illegal, yet he insists he had to be told outright that his use of marijuana is not acceptable when holding a clearance. To the contrary, I conclude he suspended his drug use long enough to pass the drug test required of new hires by his employer, then resumed using until his clearance was revoked pending the outcome of this matter. While he proffers his concern for the example he is setting for his children, I believe the real catalyst for his change of heart here was the realization he might lose his clearance. Conditional offers of abstinence from illegal activities are not acceptable. I find against Applicant as to this allegation.

The government also alleges Applicant should be disqualified for illegal drug as a matter of law under 10 U.S.C. §986(c)(2). (SOR ¶1.e) However, the plain language of this statute taken together with the implementing policy guidance from the Deputy Secretary of Defense<sup>(11)</sup> clearly specify disqualification is required if the person is currently using drugs or is addicted to illegal drugs. The facts established here show Applicant last used marijuana a year before the hearing and there is no information available to show he is addicted to marijuana or any other drug. The cited statute does not apply and I find for the Applicant as to this allegation. Nonetheless, the facts established in this case support application of Guideline H disqualifying condition (DC) 1<sup>(12)</sup> and DC 2.<sup>(13)</sup>

Having reviewed the available mitigating conditions (MC) under this guideline, I conclude MC 1 must be considered insofar as Applicant's drug use ceased more than one year before hearing. However, against the fact of his extensive history of illegal drug use over the 18 years before January 2004, Applicant has not offered sufficient evidence from

which to conclude he will not use marijuana in the future. The other potentially applicable mitigators in this case, MC 2 (14) and MC 3, (15) are not available to Applicant given the record evidence as a whole on the issue of his drug use. His representations that he now understands the adverse consequences of continued illegal drug use are severely undermined by the fact he resumed using marijuana after he passed his drug test and was awarded an interim clearance. It is simply not plausible Applicant, who is an educated, intelligent adult, would not understand that use of illegal drugs was incompatible with holding a clearance. Certainly, working in a classified environment for over a year with other clearance holders, it is unlikely he would not come to understand seriousness of his conduct well before his clearance was revoked. Based on all of the available information about Applicant's drug involvement, I conclude Guideline H against the Applicant.

Under Guideline E, a security concern arises where it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information. (16) Here, the government questions Applicant's trustworthiness because he may have deliberately omitted from his SF 86 facts about his drug use. (SOR ¶3.a) To be disqualifying, Applicant's omission must have been done with intent to deceive or mislead the government about information relevant and material to an assessment of the individual's suitability for access to classified information. While involvement with illegal drugs is certainly germane to clearance adjudications, it does not appear Applicant deliberately tried to hide the fact he had been involved with drugs. He disclosed his 1999 drug-related arrest on his SF 86, an issue that was discussed when he was interviewed by DSS, and which naturally led to a broader discussion of his drug involvement in general. Applicant fully disclosed his drug use during his DSS interview, and the issue of possible falsification was addressed in the written statement submitted subsequent to that interview, but only as it pertained to his failure to disclose information about his finances. Indeed, it does not make sense that Applicant would disclose a drug-related arrest but try to hide the fact he had used drugs. I conclude Applicant did not intentionally falsify his answer to SF 86 question 27. Accordingly, no disqualifying conditions are applicable and I find for the Applicant as to Guideline E.

Under Guideline J, the security concern is that a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information. (17) The criminal activity may consist of a single serious crime or multiple lesser offenses. Further, it is not necessary under the Directive that the criminal conduct in question actually have been charged. As noted above, the government has established Applicant was arrested for drug possession in 1999. (SOR ¶2.a) Applicant was also charged with larceny by check in 1992 and 1993 after passing bad checks to buy groceries for his family. (SOR ¶¶2.c and 2.d). However, the government has also alleged a felony violation of federal law as set forth in 18 U.S.C. 1001, in that he allegedly tried to deceive the government by omitting information about his drug use from his SF 86. (SOR ¶2.b) As discussed above, Applicant lacked the requisite intent to deceive that is a central element of the crime alleged. I find for Applicant as to SOR ¶2.b. Under Guideline J and on these facts, DC 1 (18) and DC 2 (19) apply.

In assessing the Guideline J mitigating conditions, MC 1 (20) must be considered because the last alleged criminal conduct occurred in 1999. However, even though it was not specifically alleged in the SOR, I cannot ignore the available information that shows Applicant knowingly continued to violate the law by using marijuana to at least January 2004 and questions remain about his future intentions in this regard. Thus, his criminal conduct must be considered as recent. Further, Applicant's criminal conduct is not isolated as there were three criminal charges established in this record and the aforementioned drug use is longstanding and repetitious, precluding application of MC 2. (21) Lastly, in light of Applicant's involvement with illegal drugs, there is no basis for finding clear evidence of rehabilitation as contemplated by MC 6. (22) I conclude Guideline J against Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. A fair and commonsense assessment (23) of Applicant's drug use, the probability he will continue to engage in such conduct, and his willingness to disregard the criminal aspects of his drug involvement sustains the government's concerns about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Applicant has failed to overcome the adverse information presented by the government.

## **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Illegal Drugs (Guideline H): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: For the Applicant

Paragraph 2, Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: For the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: Against the Applicant

Paragraph 3, Personal Conduct (Guideline E): FOR THE APPLICANT

Subparagraph 3.a: For the 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.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Title 18 U.S.C. §1001.
3. Tr., p. 39 - 40.
4. GE 2.
5. GE 2; Tr., p. 34.
6. Directive, Enclosure 2.
7. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
8. *See Egan*, 484 U.S. at 528, 531.
9. *See Egan*; Directive E2.2.2.

10. Directive, E2.A8.1.1.1.

11. GE 3.

12. E2.A8.1.2.1. Any drug abuse (see above definition);

13. E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

14. Directive, E2.A8.1.3.2. The drug involvement was an isolated or aberrational event;

15. Directive, E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future;

16. Directive, E2.A5.1.1.

17. Directive, E2.A10.1.1.

18. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

19. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

20. Directive, E2.A10.1.3.1. The criminal behavior was not recent;

21. Directive, E2.A10.1.3.2. The crime was an isolated incident;

22. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

23. Directive, E2.2.3.