

DATE: April 28, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-05082

## **DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

Jeffrey J. Plum, Esq.

### **SYNOPSIS**

Applicant was convicted of Receiving Stolen Goods in 1975, sentenced to imprisonment for two years (all but 60 days being suspended), placed on eighteen months supervised probation, and ordered to pay restitution. Applicant also abused various controlled substances when he was younger, was convicted of Possession of Marijuana in 1982, and last used marijuana in 1998. He failed to disclose the 1998 marijuana use in a Security Clearance Application (SF 86) he signed on August 19, 2002. Applicant has mitigated the security concern caused by his drug involvement, but has failed to mitigate the security concern that arises from his personal conduct in providing a false answer in the SF 86. Further, he is unable to mitigate the security concern his criminal conduct has created because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

### **STATEMENT OF THE CASE**

On August 27, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct, Guideline H for drug involvement, and Guideline E for personal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR dated October 1, 2003, and requested a hearing. Applicant admitted all SOR allegations, although he went on to aver the falsifications alleged in SOR paragraph 3 were not deliberate.

This case was assigned to me on November 21, 2003. A notice of hearing was issued on January 14, 2004, scheduling the hearing for January 30, 2004. The hearing was conducted as scheduled. The government submitted eleven documentary exhibits that were marked as Government Exhibits (GE) 1-11. GE 1 through GE4, GE 6, and GE 9 through 11 were admitted into the record without an objection. Applicant's objections to GE 5 and GE 8 were overruled and those documents were admitted into the record. Applicant's objection to pages two and three of GE 7 was sustained,

and the remainder of the exhibit was admitted into the record without an objection. Applicant testified at the hearing, called five witnesses to testify on his behalf, and submitted sixteen documentary exhibits that were marked AE 1-16, and admitted into the record without an objection. The transcript was received on February 4, 2004.

### FINDINGS OF FACT

Applicants' admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 47 years old, has been married since June 1976, has two adult natural children, and two adopted children, age nine and six. He and his family have lived in the same residence since January 1990. Applicant has worked at the same military test center as an automotive/heavy equipment test driver since 1983. He was employed by government contractors from 1983 to 1990; the military from 1990 to 1994 when he lost his job due to a reduction in force; and has again been employed by government contractors since 1994. The character witnesses, numerous certificates, awards, and letters of recommendation offered by Applicant attest to his reputation as a dependable, trustworthy, honest, and widely respected individual. They also establish he is valued as an excellent employee.

Applicant was charged with Breaking and Entering, Grand Larceny, and Petty Larceny on November 6, 1974. The charges were based upon his participation in the break-in of a retail store, and the theft of approximately \$500.00 worth of tools from the store. Applicant explained he had been out drinking with two friends, one of whom suggested committing a burglary because of the need for some tools. Applicant admitted being present when the two entered the store and removed the tools, but claims he remained in their vehicle and did not actually participate in the break-in and theft. He also denies receiving any of the property that was taken. Applicant pled guilty to Receiving Stolen Goods on February 13, 1975, and was sentenced to two years confinement (all but 60 days being suspended), placed on eighteen months supervised probation, and ordered to pay restitution.

Applicant was arrested for Possession of Marijuana on March 19, 1982. He was convicted of that offense on June 30, 1982 and sentenced to serve 30 days in jail (suspended), eighteen months unsupervised probation, and fined \$100.00.

Although not alleged in the SOR, the record contains evidence Applicant was involved in other minor criminal activity when he was a youth. Additionally, Applicant has admitted such involvement, including being arrested approximately six times as a juvenile for breaking and entering, and one time for knowingly being a passenger in a stolen automobile. He attributes his misconduct during this time in his life to a lack of parental discipline and supervision (his father died when he was twelve years old and his mother had to work long hours to support the family), and hanging out with the wrong people.

Applicant admits using marijuana approximately twelve times between the early 1970s and when he was arrested in 1982 while in possession of marijuana. He denies any use after his arrest, with the single exception of taking a few "hits" off a marijuana cigarette that was being passed around at a party he attended in 1998. His justification for using the marijuana on that occasion was to show that he fit in with the group. He also used cocaine three to four times between the ages of fourteen and sixteen, and LSD on two occasions when he was sixteen.

Applicant answered "No" to question 27 in the Security Clearance Application (SF 86) he signed on August 19, 2002. That questions asked: *Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs - Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example marijuana . . . ?* Based upon his admitted use of marijuana in 1998, that answer was false. Applicant has provided varying excuses for this false answer, including: he had forgotten about the 1998 use (Tr. pp. 45-46); it was an isolated incident that he chose to forget about rather than dwell on because he knew it would not happen again (SOR Answer); and he was afraid his security clearance would be denied if he listed the use (GE 11).

Applicant also answered "No" to question 28 in the SF 86. That question asked: *Your Use of Illegal Drugs and Drug Activity - Use in Sensitive Positions - Have you EVER illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?* Applicant possessed a security clearance when he used marijuana in 1998, and, accordingly, this answer was incorrect. Applicant credibly asserts he misunderstood this question.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, Guideline H, pertaining to drug involvement, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

## **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(11)</sup>

## **CONCLUSIONS**

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. Applicant was convicted of Receiving Stolen Goods in February 1975, and sentenced to two years confinement (suspended). Additionally, he was convicted of Possession of Marijuana in June 1982. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 3: *Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year* apply in this case.

Applicant has not been arrested or charged with any offense since his 1982 conviction. Additionally, the letters of recommendation, employment awards and certificates, and the testimony of character witnesses, attest to Applicant's rehabilitation and the unlikelihood that any similar conduct will ever again occur. I find Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* applicable. Applicant has mitigated the security concern that arises from his 1982 marijuana conviction, however, because of the statutory disqualification imposed by 10 U.S.C. § 986, Applicant is unable to mitigate the criminal conduct concern that arises from the 1975 receiving stolen goods

conviction. Guideline J is decided against Applicant.

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant used marijuana, cocaine, and LSD somewhat sporadically between the early 1970s and his arrest in 1982. He again used marijuana on a single occasion in 1998. DC 1: *Any drug abuse* applies in this case. MC 1: *The drug involvement was not recent*; and MC 3: *A demonstrated intent not to abuse drugs in the future* also apply. Applicant has mitigated the security concern caused by his use of marijuana in 1998, and his use of marijuana and other drugs between the early 1970s and 1982.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. I find that while Applicant did not deliberately provide a false answer to question 28 in the SF 86 he submitted, he did deliberately answer question 27 falsely. His explanation in GE11 is the most credible reason he provided a false answer, namely: he feared he would not be granted a security clearance if he were truthful. His failure to disclose the 1998 marijuana use in the SF 86 severely undermines the ability to place trust and confidence in him at the present time. His false answer, and the reasons he has given for providing that answer, raise significant security concerns.

DC 2: *The deliberate omission, concealment, or falsification of relevant and material fact*

*from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities* applies in this case. I have considered all Mitigating Conditions under Guideline E and find none apply. Guideline E is decided against Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: For the Applicant

SOR ¶ 2-Guideline H: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

SOR ¶ 3-Guideline E: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: 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 Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.