

DATE: April 6, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-08625

## **DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Juan J. Rivera, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant was charged with driving under the influence of alcohol on three occasions; he used marijuana once in 1998/99; and he used cocaine on several occasions between 1999 and August 2002. His drug abuse only stopped when he tested positive on a random urinalysis at work. He misled a drug counselor and a Defense Security Service Special Agent about the extent of his drug use following the positive urinalysis. Although he called his wife, friends, and co-workers to testify on his behalf, their testimony clearly established that he continues to mislead them about the extent of his drug abuse. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 27, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 a security concern under Guideline H for drug involvement. Applicant submitted an answer to the SOR that was received by DOHA on June 1, 2004, admitted all SOR allegations, and requested a hearing.

The case was assigned to me on December 8, 2004. A notice of hearing was issued on December 8, 2004, scheduling the hearing for December 30, 2004. The hearing commenced as scheduled, but was continued at Applicant's request following completion of the Government's case until January 14, 2005. <sup>(2)</sup> The hearing was reconvened and completed on the continued date. The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7, and admitted into the record without objection. Applicant testified, called five witnesses to testify on his behalf, and offered 13 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-13, and admitted into the record without objection. The final transcript was received on January 28, 2005.

### **PROCEDURAL MATTERS**

Before the introduction of evidence, Department Counsel moved to amend the SOR to allege conduct under Guideline G, alcohol consumption. Consistent with Department of Defense Directive 5220.6, Enclosure 3 (Additional Procedural Guidance), paragraph E3.1.17, and over an objection

from Applicant, the amendment was allowed as stated in the *Motion to Amend the Statement of Reasons* (Appellate Exhibit II).

### **FINDINGS OF FACT**

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

Applicant is 41 years old, married, has no children, and has been employed as an engineer by various defense contractors since 1985. He was initially issued a security clearance sometime in the mid 1980s that for administrative reasons lapsed sometime in the late 1980s or early 1990s. He was again issued a security clearance in 1997 and has possessed that clearance since. Applicant received a bachelor of science degree in electrical engineering in May 1985, and a master of science degree in software engineering in April 2003. The work performance appraisals he submitted and the testimony of his witnesses attests to reputation for being a competent and professional engineer who is perceived as reliable, trustworthy, and a valuable asset to his employer. Applicant has recently passed state administered engineering tests as part of the process for him to obtain a state engineering license.

Applicant and his wife have been a couple for the past 24 years, although they did not actually marry until September 1991. They both testified about their relationship and the strain that was placed upon it apparently because of conflicting work schedules that caused them to see very little of each other. They estimated the problems in their relationship began in about 1999. They participated in 20 counseling sessions between June 2001 and February 2002 that began to resolve the difficulties they were having. Applicant's wife testified their relationship has improved even more since Applicant tested positive for cocaine in his system in a work administered random urinalysis in August 2002.

In addition to marital problems, Applicant dealt with the stress related to his mother's illnesses and eventual death in 2003. Applicant's mother initially lived in a neighboring state and he would travel to her house on occasion to provide assistance to her. In approximately January 2003, he found her living in squalor, suffering from a terminal illness, and completely unable to care for herself. Applicant and his wife moved her in to live with them beginning in January 2003, and cared for her for a couple of months until she went to live with other relatives until the time of her death.

Applicant was convicted of driving under the influence of alcohol (DUI) in May 1985, and was placed on probation for one year, ordered to attend an alcohol awareness program, and had his driving privileges temporarily suspended. He was again charged with DUI in November 1985,<sup>(3)</sup> was found not guilty following a trial, and adamantly denies that he was intoxicated. He explains the 0.14 blood alcohol concentration he once stated he had tested at following this arrest to his consumption of alcohol following the automobile accident that led to his arrest.

Applicant was last charged with DUI on November 16, 1997. Although Applicant denies he was intoxicated at the time of his arrest, the police reports (GE 7) provide sufficient evidence of the arresting officer's observations and conversations with Applicant to find he was operating a motor vehicle while under the influence of alcohol. Applicant pled guilty to reckless driving on February 18, 1998, and was sentenced to supervised probation for 12 months, ordered to pay fines and court costs totaling \$656.00, perform 100 hours community service, and attend a victim awareness program.

Applicant's witnesses were each questioned concerning their observations of his use of alcohol. Each of them who has ever been in a position to see him consume alcohol describe him as no more than a social drinker. None have ever observed him under the influence of alcohol or had any occasion to suspect that he may have a problem controlling his alcohol consumption.

Applicant tested positive for the presence of the cocaine metabolite in his system during a randomly administered urinalysis ordered by his employer on August 20, 2002. As a result of the positive test, he was referred to the company's employee assistance program. An assessment was conducted by a licensed clinical social worker employed by the program on November 7 and 14, 2002, during which Applicant denied ever using any controlled substance. (GE 6, items 5 and 11) The social worker concluded: "(I)t appears that this patient is not a drug user and has no intention to begin drug use in the future"; and "(T)his patient appears to have no impairment in his judgement or reliability." (GE 6, items 12 and 13) It was recommended that he attend two drug education classes and submit to six random drug tests.

Applicant was interviewed by a Special Agent from the Defense Security Service (DSS) on February 27, 2003. (GE 3) During the interview he initially claimed the positive urinalysis resulted from his one and only use of cocaine that occurred at a party where he sniffed two lines of the drug provided by an individual he claimed to know only casually. He affirmatively stated: "(T)his is the only time that I have ever used any type of illegal drug."

While the record is silent about how Applicant's change of position came about, Applicant later admitted during the interview that he had not initially been honest about his use of illegal drugs. He thereafter admitted having used marijuana on one occasion in about 1998-99, and cocaine on five or six occasions between 1999/2000 and August 2002. Applicant claims he has not used any controlled substance since August 2002, and submitted the results of three hair analyses for the presence of drugs that he voluntarily, though randomly,<sup>(4)</sup> had performed on March 3, 2003, May 5, 2004, and December 7, 2004. (AE 7)

Department Counsel inquired of each Applicant witness as to their knowledge of Applicant's drug abuse. While each testified they were aware of

the positive urinalysis, none of them indicated knowledge of other drug abuse on Applicant's part. Applicant's friend for more than 20 years specifically testified he was aware of the positive urinalysis, did not know of any other time when Applicant abused drugs, and that the abuse of drugs would be out of character for Applicant. (Tr. p. 41)

Most notably, the following testimony was provided by Applicant's wife:

Q. . . . What did he tell you about the use of drugs?

A. He admitted it to me shortly after the occurrence.

Q. What did he say?

A. He came home from work and said he had gotten drug tested and it came back positive.

Q. Did he tell you where he consumed the drugs?

A. He said he was out and we were not, you know, our relationship was not, was still, like I said a work in progress and he had an opportunity that presented it to himself and it was poor judgment on his part and it's something that happened.

\* \* \*

Q. So, as far as you know, he has only used cocaine one time in his life?

A. As far as I know, yes. (Tr. p. 30)

### **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 H, pertaining to drug involvement, and Guideline G, pertaining to alcohol consumption, 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>(5)</sup> The government has the burden of proving controverted facts.<sup>(6)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(7)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(8)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(9)</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>(10)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(11)</sup>

No one has a right to a security clearance,<sup>(12)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(13)</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>(14)</sup>

### **CONCLUSIONS**

Under Guideline G, alcohol consumption is a security concern because excessive alcohol

consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. Those who abuse alcohol are more likely than others to engage in high risk, thoughtless, and sometimes violent behavior. Recurrent use of alcohol to the point of intoxication may affect an individual's ability to exercise the care, judgment, and discretion necessary to protect classified information.

Although there is insufficient evidence to conclude the November 1985 DUI charge was valid, Applicant was convicted of DUI arising from the

May 1985 arrest and reckless driving arising from the November 1997 DUI arrest. Disqualifying Condition (DC) 1: *Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use* applies.

Applicant's two alcohol related incidents occurred twelve years apart. There have been no arrests or other reported alcohol related incidents since 1997. His witnesses, including his wife, describe him as no more than a social drinker, and none have had any occasion to suspect he has a problem controlling his consumption of alcohol. Mitigating Conditions (MC) 1: *The alcohol related incidents do not indicate a pattern*; MC 2: *The problem occurred a number of years ago and there is no indication of a recent problem*; and MC 3: *Positive changes in behavior supportive of sobriety* apply. Guideline G is decided for 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 once in 1998/1999, and cocaine five or six times between about 1999/2000 and when he tested positive for the drug in August 2002. He possessed a security clearance when he consumed those drugs. DC 1: *Any drug abuse* applies. <sup>(15)</sup>

The positive urinalysis and at least partial resolution of the stresses Applicant was experiencing while abusing drugs appear to have resulted in his decision to forsake drug abuse in the future. The negative hair screens strongly indicate he has not abused any controlled substance since August 2002, and his and his wife's testimonies provide a strong indication he will not resort to drug abuse in the future. Accordingly, Applicant is entitled to application of MC 1: *The drug involvement was not recent*; and MC 3: *A demonstrated intent not to abuse any drugs in the future*.

However, 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. Having done so, I find Applicant's continuing lack of honesty and candor about his drug abuse weighs heavily against reposing in him the trust and confidence that must be accorded to one who is to be given access to the nation's secrets.

Applicant lied to the social worker in November 2002 about his use of drugs. His denial undoubtedly factored in her determination that he was not a drug user and had no impairment in judgment and reliability. Likewise, her recommendation that he required nothing but the most minimal drug education was almost certainly influenced by his untruthfulness. He continued lying about his drug use when he was initially interviewed by a DSS Special Agent in February 2003. Applicant's failure to discuss the full extent of his drug abuse with his character witnesses may be understandable; however, the fact that he continues, at least as of the date of the hearing, to mislead his wife about his drug abuse reflects negatively on his integrity, honesty, and trustworthiness.

After considering the evidence of record in this case, the "whole person" considerations, including Applicant's continued display of lack of integrity, honesty, and trustworthiness, and weighing the disqualifying conditions against the mitigating conditions, I find Applicant has failed to mitigate the security concerns caused by his drug involvement. He has neither overcome the case against him nor satisfied his ultimate burden of persuasion on this issue. Guideline H is decided against Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline H: Against Applicant

Subparagraph a-e: Against Applicant

SOR ¶ 2-Guideline G: For the Applicant

Subparagraph a-c: 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. Applicant filed a written *Motion for Continuance* that was marked as Appellate Exhibit I. Prior to the scheduled hearing, a conference call was held with Applicant and Department Counsel. Department Counsel objected to a continuance, and, with the agreement of both parties, I denied the continuance while granting Applicant the opportunity to renew the request at the hearing in the event his witnesses were still unavailable at that time.
3. The security clearance application he submitted in December 1999 (GE 1) lists the date of this arrest as November 1986, but all other references to the date in the record are November 1985.
4. Applicant testified he provided the hair samples when he received official correspondence concerning this case, thereby guaranteeing the randomness of the tests.
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
7. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
12. *Egan*, 484 U.S. at 528, 531.
13. *Id* at 531.
14. *Egan*, Executive Order 10865, and the Directive.
15. DC 5: . . . *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* does not apply in this case based upon my finding that under the circumstances present herein Applicant's use of marijuana and cocaine is not recent.