

DATE: September 29, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-00151

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

**FOR APPLICANT**

Robert W. Gevers II, Esq.

**SYNOPSIS**

Applicant is 49 years old, married with three children and four grandchildren. He has a history of illegal drug use going back to 1973. He deliberately falsified his 1989 and 1996 security clearance applications about his drug use, and made false statements to Government investigators in those years. Applicant has not mitigated the personal conduct and criminal conduct security concerns. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 26, 2005, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on September 15, 2005, and elected to have a hearing before an administrative judge. The case was assigned to me on January 12, 2006.

On May 16, 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government amended the SOR to add subparagraph 1.h. Applicant did not object, and I granted the motion. (Tr. 7-9) The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on May 25, 2006.

**FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 49 years old, married for 28 years, and has three adult children. He has four grandchildren. He is a lay

minister for his church. He is an electrical engineer, and employed by a defense contractor. He currently has a top secret security clearance. He has had either a secret or top secret clearance since 1982. (Tr. 19-24; Exhibits 1-3, 5, 6)

Applicant's work performance evaluations for 1998 through 2005 show he is hard working, possesses good organizational skills, and a "quick analytical ability" that allows him to prepare documents for clients in excellent time. Applicant also received achievement awards, certificates of merit from his employer, and other documents recognizing his contributions to his employer's efforts to obtain and execute government and civilian contracts. (Tr. 38-46; Exhibits C to F)

Applicant has a history of the illegal use of controlled substances from 1973 to 1982, and from 1994 to 1997. He did not fully disclose his history of illegal drug use until his 2003 security clearance application (SCA). He made partial disclosures on his 1989 SCA and in a subsequent statement to Government investigators. He made no adverse disclosures in 1996 on his SCA when he had been using crack cocaine since 1994, and continued to use it into March 1997. In 2003 he made full disclosure on his SCA and in a subsequent statement to Government investigators, both of which occurred after his driving while under the influence arrest and conviction on February 10, 2003. He had a security clearance since 1982 that he needed for his employment. (Tr. 23-34, 48-70; Exhibits 1-7)

Applicant's earliest illegal drug use was from 1973 to 1982 with weekly use of marijuana and trafficking in it, use of hashish, cocaine, barbiturates, and the sale and use of LSD. In 1975 Applicant was investigated for the sale of LSD to other high school students and was barred from the overseas military base where his family lived for that activity. He bought the LSD for \$1.00 a "hit" and sold it for \$5.00 each. His 1988 and 1989 disclosures were on his September 21, 1988, SCA. Applicant admitted in answering Question 18 only to using, purchasing, and possessing marijuana, with the last time being the spring of 1982. In his statement to Government investigators on January 31, 1989, he expanded those admissions to include using marijuana two or three times yearly from 1973 to 1982, trying cocaine, barbiturates, and LSD once each in the early 1970s, but denied trafficking in marijuana. He also admitted using hashish from 1973 to 1975, and having problems with alcohol. He claimed he would not use illegal drugs again in the future. He called the investigators to amend his statement by admitting he falsified his SCA and lied to the investigator when he made his first statement a few days earlier. In his later disclosure on February 2, 1989, he finally admitted in his supplemental statement he sold LSD in 1975, used and trafficked in marijuana, and used hashish. He deliberately falsified his 1988 SCA because he did not want his employer to learn of his past drug use. (Tr. 31, 48-53, 68; Exhibits 1, 4, 6)

On his 1996 SCA Applicant denied illegally using any controlled substances in the past seven years, or using a controlled substance while possessing a security clearance, in answer to Questions 24a and 24b. Applicant deliberately failed to disclose that he used crack cocaine from 1994 and up to and after May 2, 1996, when he completed this SCA. Applicant still had a security clearance that was renewed in 1989 while he used crack cocaine. Applicant attributed his use to family separation when moving to a new job in a new town, marital problems, and a lack of self-worth. Applicant did not disclose his crack cocaine habits to a Government investigator during a May 17, 1996, official interview. His security clearance was later renewed and upgraded to a top secret classification. (Tr. 32-34, 55-60, 64; Exhibits 2, 6)

Finally, on his August 1, 2003, SCA he admitted his past drug use, including the crack cocaine use from December 1, 1994 until March 1, 1997, and the 1975 drug trafficking involving LSD sales, and marijuana acquisitions for other people at his overseas location where he lived with his family during high school. His August 19, 2003, statement to Government investigators admitted the crack cocaine use, but only from 1994 to 1996, claimed he would not use illegal drugs in the future (as he did on his 1989 statement), and gave information about his February 10, 2003, driving while under the influence of alcohol arrest. Applicant could not remember dates well enough to explain the different dates of 1996 and 1997 for the cessation of his crack cocaine use. (Tr. 25, 27, 59-70, 74; Exhibits 3, 5-7)

Applicant was on a business trip for three weeks in February 2003. His birthday fell on a weekend during the trip, and he celebrated it by having dinner with wine. He drank wine every hour for five hours, and then went to a pool hall with two people he met in the restaurant. At the pool hall he drank beer until 2 a.m. Returning to his hotel, he became lost and was stopped by the local police for driving while intoxicated. He admitted his actions and a judgment was entered in February 9, 2004. He was found "responsible" under that state's law for the simultaneous speeding violation. Applicant's driving privileges were suspended for 45 days, and he had to attend an alcohol education program. He completed that program in his home town later. Applicant was fined \$475 in fines and fees. (Tr. 25, 26, 61-64; Exhibits 3, 5, 7)

Applicant applied for insurance recently and had a drug screen. The February 2006 hair test showed no evidence of amphetamines, cannabinoids, cocaine, opiates, or phencyclidines. The April 2006 blood test showed no evidence of cocaine. Applicant has not used illegal drugs since 1997. (Tr. 34-36, 65; Exhibits A and B)

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.* E2.A10.1.1

## CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Therefore, certain Disqualifying Conditions (DC) from each guideline will apply. The burden of proof then shifts to the Applicant to demonstrate which Mitigating Conditions (MC) apply.

Under the personal conduct security concern, DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security clearance eligibility or trustworthiness E2.A5.1.2.2), DC 3 (Deliberately providing false or misleading information concerning relevant and material matters to an investigator or other official representative in connection with a personnel security or trustworthiness determination. E2.A5.1.2.3), and DC 4 (Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4) apply. Applicant did not disclose his past drug use in 1989 on his SCA, nor was he truthful in his initial interview with the Government investigator. In 1989 Applicant only disclosed the fullest extent of his 1973 to 1982 drug use after his initial interview when he amended his statement. At this time Applicant had a secret security clearance, and continued to use illegal drugs. Nor did he make any disclosure on his 1996 SCA about his 1994 to 1997 crack cocaine use, or to the Government investigator on May 17, 1996. In 1996 he continued to have a security clearance. The use of illegal drugs while possessing a security clearance is behavior that increases Applicant's vulnerability to coercion and blackmail.

MC 3 (The individual made prompt, good-faith efforts to correct the falsification before being confronted by the facts E2.A5.1.3.3) applies to his February 1989 subsequent statement to the investigators. It does not apply to his 1996 SCA and statement. These are not isolated incidents of deliberate falsification, but part of a pattern of deception designed by Applicant to hide from his employer and the Government his true use of illegal controlled drugs. The falsifications were not recent, but were part of Applicant's efforts to keep his job and security clearance. Over the past 18 years Applicant deceived and misled the Government. While his recent insurance drug screens show no illegal drug usage at the time tested, Applicant has not enrolled in any drug rehabilitation program. His long-term drug use would require that course of action to allay the Government's current concerns about him. Finally, his repeated falsifications undermine his credibility. Therefore, I conclude this security concern against Applicant.

The criminal conduct that concerns the Government is Applicant's alcohol-related driving incident in February 2003, and the illegal drug use as detailed in Paragraph 1 of the SOR. The applicable DCs are DC 1 (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1), and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2). Applicant used illegal controlled substances from 1973 to 1982, then again from 1994 to 1997, and lied about them on his SCA and to investigators. Finally in 2003 he decided to tell the truth to avoid being blackmailed and to cleanse his conscience.

These crimes are not isolated incidents, but part of a pattern of behavior intended to hide Applicant's lengthy history of drug use, so MC2 does not apply. They occurred from 1982 when Applicant received his first security clearance, until 2003 when he decided to make full disclosure about his past drug use and criminal conduct after two renewal applications. Serious doubt thereby arises about his truthfulness, judgment, and trustworthiness. His conduct is recent enough to prevent the application of MC 1, especially when weighed against the totality of his actions. I conclude this security concern against Applicant.

Applying the whole person concept to Applicant's situation does not make me render a contrary conclusion. Applicant

was an adult when he committed these actions. He is an educated professional who deliberately falsified continuously his disclosures to the Government. He has not undertaken any drug rehabilitation or systematic testing to support his assertion he has not used illegal drugs since 1997. His conduct is serious, voluntary, motivated by his own desire for pleasure, and there is no assurance that it will not occur again in the future, particularly in view of Applicant's has made two statements to investigators in 1989 and 2003 that he would not use illegal drugs in the future, but he continued to do so after his 1989 statement. I do not believe his 2003 statement that he no longer uses drugs. Therefore, I again conclude this security concern against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

### **DECISION**

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).