

DATE: May 17, 2000

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 99-0588

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Arthur A. Elkins, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On October 1, 1999, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons 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 determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on January 11, 1999 and elected to have his case decided on the basis of the written record. Applicant was furnished the File of Relevant Material (FORM) on February 23, 2000, and is credited with receiving it on March 17, 2000. Within the time permitted, he provided a written response to the FORM. The case was assigned to this Administrative Judge on April 20, 2000.

**STATEMENT OF FACTS**

Applicant is a 35-year old employee for a defense contractor (Company US), where he has been employed for about sixteen years. He has held a security clearance since April 28, 1995 and seeks to retain the same.

**Summary of Allegations and Responses**

Applicant is alleged to have (a) used marijuana on at least May 25 and 26, 1998, (b) been tested positive for marijuana during a drug test given by his employer (Company US) on June 4, 1998, was removed from his employment until June 15, 1998, been referred to a drug counseling program and been subjected to random drug tests for one year, and (c) used marijuana above and after he had been granted a secret clearance on April 28, 1995.

Additionally, Applicant is alleged to have adulterated his urine sample with fertilizer during a random drug test given by his employer (Company US) on May 28, 1998 and denied his using illegal drugs or adulterating his urine when initially

interviewed by Dr. A on June 4, 1998.

For his response to the SOR, Applicant admitted each of the allegations. In mitigation, he claimed that his first and only drug involvement was over eighteen months previous. He claimed to have completed drug counseling and has no intention of using drugs in the future. Claiming to have voluntarily corrected the wrong, he assured he has never been in trouble before. Applicant claimed a good work record that includes several upgrades, excellence awards and attendance awards, as well as an achievement award in June 1999. And he contended that losing his clearance would be detrimental to his career.

### **Relevant and Material Factual Findings**

The allegations covered in the SOR and admitted to by Appellant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

While at a friend's barbeque in the evening of May 25 and early morning hours of May 26, 1998, Applicant tried marijuana, smoking four to five marijuana cigarettes that were passed around. The marijuana belonged to a guest, who he did not know. Over an eight-hour period, he estimates to have taken ten to fifteen marijuana puffs. The marijuana made him feel nauseous and dizzy and caused him to vomit later in the evening. Consciously aware that his using any illegal substances was incompatible with his holding a security clearance, he chose to smoke marijuana in hopes that it would relieve the pain of an abscess on his gums. Applicant has a history of gum-related problems, for which he had undergone root canal and gum surgery to correct. He has not used marijuana before or since, and assures his intention of avoiding any illegal drugs in the future.

Randomly selected by his employer (Company US) to be drug tested on May 28, 1998, Applicant panicked over his fears of what negative implications a positive drug test result could have on his clearance and job. Fearful of detection, he adulterated his urine sample with ammonia nitrate fertilizer the day before in anticipation of neutralizing any positive presence of marijuana in his system. The purposely adulterated nitrates prevented any positive test reading and afforded Applicant some initial cover.

After the nitrates were identified by the testing laboratory, Applicant was scheduled for retesting (on June 4, 1998). The test results from his administered June 4 urinalysis proved positive for marijuana. When initially confronted with the test results (*i.e.*, on June 4, 1998) by his employer's company physician (Dr. A), Applicant denied ever using illegal drugs. He firmly denied adulterating his urine, too; albeit, he admitted to taking ammonia nitrate fertilizer the day before. He was characterized by Dr. A to be very cooperative in this initial session, but noticeably upset as well.

The following day (on June 5, 1998), Applicant consulted again with his company's physician. In this meeting Applicant and Dr. A talked freely about Applicant's test situation and arranged a meeting for later in the afternoon of the same date. Unable to dispel his sense of guilt over masking his marijuana use, he called Dr. A at his home in the evening of June 5 and admitted to adulterating his urine sample. In this conversation, he arranged a meeting with Dr. A for June 9, 1998 to discuss his marijuana use. In this June 9 meeting, he both acknowledged his use of marijuana at a friend's barbeque in the evening of May 25 and early hours of May 26, 1998 and knowingly and wilfully adulterating his urine to avert testing positive at his randomly selected May 28 urinalysis session.

Following his positive urinalysis retest in June 1998, Applicant was temporarily suspended from his place of attendance (*i.e.*, on June 15, 1998), company-referred to ACORN (a drug counseling program) for treatment, and subjected to random drug testing for one year. Over the ensuing months, he completed Narcotics Anonymous ("NA") classes, ACORN counseling sessions and participated in a special drug testing program consisting of 36 tests (each of which produced negative results for Applicant). Not content with his counseling and testing success, he signed on to a random drug testing pool. Since his last reported positive drug test (*i.e.*, his June 4 test results), he has kept himself clean from any illegal drugs (a period of twenty-two months now), which he corroborates in part with consistent negative random drug test results.

Applicant has maintained a good work record: both work performance and attendance. He remains very remorseful for his drug use and adulteration mistakes and assures neither will happen again. His remorse/mistake claims, while manifestly sincere, must await evaluation of the entire record.

## POLICIES

The Adjudicative Guidelines of the Directive (Change 4, adopted April 20, 1999) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Drug Involvement**

Basis: 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.

#### **Disqualifying Conditions:**

- 2.1. Any drug abuse.
- 2.2. Illegal drug possession, including cultivation, processing manufacture, purchase, sale or distribution.

#### **Mitigating Conditions:**

- 3.2. The drug involvement was an isolated or aberrational event.
- 3.3. A demonstrated intent not to abuse any drugs in the future.

### **Personal Conduct**

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

#### **Disqualifying Conditions:**

- 2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.
- 2.5. A pattern of dishonesty or rule violations.

#### **Mitigating conditions:**

- 3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.
- 3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.
- 3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of unauthorized personnel, and the previously omitted information was promptly and fully provided.

## **Burden of Proof**

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## **CONCLUSIONS**

Applicant's positive drug test and adulterating of his urine sample to avoid detection present troubling concerns about his eligibility to hold a security clearance despite a credible employment record with his defense contractor. While his use of the covered illegal substances days before his positive drug test may have been isolated, he is hard pressed to make the persuasive case in the wake of (a) his imputed knowledge that use of illegal substances was incompatible with holding a security clearance (which he held at the time) and (b) the ensuing efforts he took to conceal his use. Ignoring any overriding security concerns by his using marijuana and following his use of the substance with actions designed to divert discovery only complicates his efforts to convince he is at no risk to use of illegal substances in the future.

In fairness, Applicant does appear to be sincere in his remorse and assurances that he will not use illegal drugs again. Strengthening his mitigation efforts, too, is completion of drug counseling, participation in NA classes and meetings and acceptance of random drug testing (with 36 negative results so far to his credit) to underwrite any risks of recurrent drug use. But considering the circumstances in which he attempted to deceive the Government about his marijuana use, twenty months of drug avoidance is still insufficient to satisfy the mitigation requisites for making safe predictive assessments against any resumption of marijuana involvement.

Both the circumstances of Applicant's involvement in illegal substances and the relatively brief time he is able (approximately twenty-two months) to document discontinuance preclude safe predictions he is currently fully absolved of recurrence risks. True, his track record to date since testing positive is encouraging (to include his negative random drug tests, completion of his ACORN counseling and NA participation). Just the same, his efforts require additional seasoning before he can be absolved of all reasonable doubts about recurrent use. Applicant's proofs are insufficient to avert overall unfavorable conclusions with respect to Guideline H.

Equally security significant are Applicant's admitted adulterating of his urine sample to avert an anticipated positive test. When initially confronted about the presence of nitrates in his urine by Dr. A following his retesting (on June 4, 1998), Applicant "panicked" out of concern for losing his job and clearance and declined to acknowledge his deliberate attempts to debase his drug test. He declined again to acknowledge his use and test sabotaging actions when interviewed again the next day. Not until overcome by conscience later in the day (*i.e.*, in the evening of June 5) did he elect to come forward with his admitted use and adulteration of his urine sample. So much trust is imposed on persons cleared to see classified materials that margins of tolerance are necessarily narrow where candor lapses occur. By his own admissions, Applicant omitted his ingestion of nitrates in the belief it could foil his scheduled urine test out of concern for his job and security clearance. That he may not have adequately appreciated the implications of his actions is not sufficiently developed to assess the materiality of his claims. Manifestly, he made deliberative choices about prioritizing his own

job/clearance interests over the Government's public interests in evaluating any effects of his using illegal drugs on his suitability to hold a security clearance.

With due respect to Applicant's personal employment-related interests and harbored concerns over placing his clearance at risk with an anticipated positive drug test, the Government is fully entitled to have relevant drug test data supplied by existing clearance holders (such as Applicant) regardless of the potential for personal jeopardy that accompanies full disclosure. Applicant's omissions, as such, were made knowingly and wilfully and involve matters material to making a careful assessment of his security worthiness.

Applicant's sample debasing was compounded by his failure to correct it when first challenged by Dr. A: following retesting and again in a follow-up session on June 5, 1998. While Applicant is credited with making correcting admissions in the evening June 5, his corrections cannot be characterized as free of confrontation within the definitional parameters of the Adjudicative Guidelines of (for personal conduct). As such, Applicant cannot justifiably claim the mitigation benefits of either MC 3.2 (isolated omissions), MC 3.3 (prompt, good faith disclosures) or MC 3.4 (reliance on the advice of others). And his extenuation and mitigation efforts are not sufficient to enable him to carry his evidentiary burden under Guideline E.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors enumerated in the Adjudicative Process section of Enclosure 2 of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

**GUIDELINE H (DRUGS): AGAINST APPLICANT**

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

**GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT**

Sub-para. 2.a: 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge