

DATE: December 29, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 06-01686

**DECISION OF ADMINISTRATIVE JUDGE**

**ERIN C. HOGAN**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Personal conduct, criminal conduct, and drug involvement concerns were raised pertaining to Applicant's failure to list three marijuana possession charges which occurred in the early 1990s. In ay 2001, he was terminated for refusal to submit to a random urinalysis test. I find credible his explanation that his failure to take the random urinalysis test was the result of receiving an emergency phone call from his wife indicating that his son was in a serious accident. His failure to list his three drug-related charges from the early 1990s was not deliberate. He misunderstood the question and thought he only had to go back seven years. He has not used illegal drugs in over 13 years. Applicant mitigated the security concerns raised under Guidelines E, J, and G. Clearance is granted.

**STATEMENT OF THE CASE**

On March 22, 2006, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E, Personal Conduct; Guideline J, Criminal Conduct; and Guideline H, Drug Involvement.

In a sworn statement signed June 8, 2006, Applicant responded to the SOR allegations and requested his case be decided on the written record. On July 3, 2006, he changed his mind and requested a hearing. The case was assigned to another administrative judge on July 19, 2006. DOHA issued a notice of hearing on October 27, 2006, scheduling the hearing for November 14, 2006. The hearing was delayed for good cause and the case was transferred to me on November 17, 2006. DOHA issued a new notice of hearing on November 17, 2006, rescheduling the hearing for December 1, 2006. The hearing was conducted as scheduled. The government submitted nine exhibits that were marked as Government Exhibits (Gov Ex) 1-9. The exhibits were admitted into the record without objection. Applicant testified on his own behalf and submitted 10 exhibits which were marked as Applicant Exhibits (AE) A-J and admitted without objection. DOHA received the hearing transcript (Tr.) on December 11, 2006.

## FINDINGS OF FACT

In his SOR response, Applicant admits to all of the allegations in SOR ¶¶ 1.b, 2.a, 2.b and 3.a. Although he admits to SOR ¶ 1.a, his further explanation indicates he did not intend to falsify his security clearance application. As such, I conclude his intent was to deny this allegation as well as SOR ¶ 2.c. Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 63-year-old truck driver for a defense contractor who is applying for a security clearance.<sup>(2)</sup> He is a high school graduate.<sup>(3)</sup> He is married and has two children, a son age 27 and a daughter age 18.<sup>(4)</sup>

Applicant enlisted in the United States Marine Corps on November 4, 1975.<sup>(5)</sup> He first trained in the military police career field but transferred to a position as a heavy equipment operator. On April 17, 1979, he was apprehended by military police for possession of marijuana. A military policeman was writing a ticket for his car which was illegally parked outside a barracks. The military policeman observed a marijuana pipe in the ashtray of the car.<sup>(6)</sup> Applicant was punished under Article 15, Uniform Code of Military Justice. He was fined and demoted from lance corporal to private.<sup>(7)</sup> He continued to serve in the United States Marine Corps until March 25, 1981. He separated from active duty as a lance corporal with an Honorable Discharge.<sup>(8)</sup>

In the early 1990s, Applicant used cocaine and marijuana on several occasions. His use was recreational and he never sold illegal drugs. During this time period, he used cocaine or marijuana approximately twice a week.<sup>(9)</sup>

On November 18, 1990, Applicant was arrested and charged with possession of marijuana and possession of drug paraphernalia. He pled guilty to possession of drug paraphernalia and was sentenced to a \$98 fine.<sup>(10)</sup>

On April 18, 1993, Applicant was arrested and charged with two counts of possession of a controlled substance, cocaine and marijuana. He pled guilty and was sentenced to a \$1,000 fine. He was informed that the charge would not be on his record.<sup>(11)</sup>

On October 8, 1993, Applicant was arrested and charged with possession of marijuana less than 2 oz. He pled guilty and sentenced to 30 days confinement (probated when fine and costs were paid), fined \$500, and ordered to pay \$160 in court costs.<sup>(12)</sup>

In April 1999, Applicant started work with a trucking company. He worked for this company until 2001. On April 15, 2001, the company awarded him a Safety Award Certificate.<sup>(13)</sup> On May 22, 2001, he was selected to take a Department of Transportation random urinalysis test. Sometime after being notified that he was selected to take a urinalysis test, his wife contacted him and told him that his son was in the hospital in a coma. He had been involved in a bad automobile accident. Applicant immediately left to drive home to see his son. His family lived three hours away from his job location. Prior to leaving, he tried to locate the individual who was in charge of the urinalysis program but he was not in the office. He was terminated for refusal to provide a urinalysis test. He later provided a doctor's note to the company verifying that his son was in an accident. The company terminated him anyway.<sup>(14)</sup>

In April 2003, Applicant was hired by a contractor who works on a military installation. On May 8, 2003, he applied for a security clearance.<sup>(15)</sup> In response to question 20 on the security clearance application which asks about whether an employee had ever been fired from a job or left a job under unfavorable circumstances, Applicant answered "yes" and indicated that he was fired in May 2001 for refusing to take a random drug test.<sup>(16)</sup> He answered "No" to Question 24 on the application which reads:

**Your Police Record - Alcohol/Drug Offenses.** Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C.

844 or 18 U.S.C. 3607.

He did not list his drug-related charges which occurred in November 1990, April 1993, and October 1993. Applicant did not intend to deliberately withhold the information related to his drug-related arrests. When he filled out the security clearance application, he thought he only had to list offenses that went back seven years. Since all of these offenses occurred more than seven years ago, he did not think he had to list them. [\(17\)](#)

Applicant has not used illegal drugs since his last arrest in 1993. He realizes that he has too much to lose by using illegal drugs and has no intention of using illegal drugs in the future. He no longer associates with his friends who were illegal drug users. [\(18\)](#) He continues to be subject to random urinalysis in subsequent truck driving jobs and has never had a positive urinalysis. [\(19\)](#)

Due to the length of his security clearance investigation, Applicant was let go from his position with the defense contractor but is subject to rehire pending the outcome of the investigation. He got a job with another trucking company on September 8, 2005. [\(20\)](#)

Applicant's foreman at the Department of Defense contractor he recently worked for, provided a letter on his behalf. He indicates Applicant is a self-starter and a very capable vehicle operator. He notes that he demonstrates a very positive attitude regarding driver operator safety and is a team player. He states that Applicant works in a drug free work force and never tested positive for any substance and did not have any DOT reportable incidents. [\(21\)](#) His current manager indicates that Applicant has an excellent work history with on time service and a clean safety record. He is good at customer service and she considers him a valued employee. [\(22\)](#)

## POLICIES

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." [\(23\)](#) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline E - Personal Conduct: 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. [\(24\)](#)

Guideline J - Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. [\(25\)](#)

Guideline H - Drug Involvement: 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. [\(26\)](#)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." [\(27\)](#) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. [\(28\)](#) An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances

surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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. <sup>(29)</sup>

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. <sup>(30)</sup> Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts admitted by the applicant or proven by Department Counsel. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. <sup>(31)</sup> Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. <sup>(32)</sup>

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guidelines E, Personal Conduct; H, Drug Involvement; and J, Criminal Conduct.

### **Guideline E - Personal Conduct**

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. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

In this case, the potential disqualifying condition that could apply with respect to SOR ¶ 1.a is Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*The deliberate omission, concealment, or falsification of relevant and material facts 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*). The record evidence fails to establish Applicant deliberately omitted or concealed information about his drug-related arrests. The most recent arrest occurred close to 10 years prior to Applicant submitting his security clearance application in May 2003. Although his answer to question 24 was incorrect, he successfully rebutted the allegations that he deliberately provided a false answer. He was under the mistaken belief that he needed to only list arrests that went back seven years.

I find Applicant's explanation credible because there are numerous questions on the SF 86 that only require applicants to go back seven years when responding to the question. The fact that Applicant listed his most recent unfavorable incident - his May 2001 job termination for refusing to take a random drug test - in response to question 20 further supports Applicant's lack of intent to falsify his security clearance application. <sup>(33)</sup> Applicant fully cooperated with investigators regarding his drug-related arrests when he was interviewed in conjunction with his background investigation. SOR 1.a is decided for Applicant.

With respect to SOR ¶ 1.b which raises a personal conduct security concern related to Applicant's termination in May 2001 for refusal to submit to random drug testing; PC DC E2.A5.1.2.2 (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) applies. Applicant admits to being aware that he was selected to provide a random urine sample on the day of his termination. He admits that he left his job location without providing a urine sample. The fact that he was fired is unfavorable information.

Considering the Personal Conduct Mitigating Conditions (PC MC), PC MC E2.A5.1.3.1 (*The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) has the potential to apply to the facts of this case. I find that it does apply. Applicant fully disclosed the fact that he was terminated on his security clearance application. He provided a sufficient explanation as to why he did not provide a urine test. After he learned that his son was in a coma after an automobile accident, he left work without providing a urine sample. In hindsight, the better choice would have been to not leave until he contacted the individual in charge of the urinalysis program, however, he had a family emergency. Any reasonable person would likely do the same thing Applicant did under the circumstances. His attempts to get his job back by submitting a doctor's note proved unsuccessful. However, I conclude that his explanation for failing to provide a urine sample was sufficient. He has continued to drive trucks since his May 2001 termination. He remains subject to random urinalysis and has never had a positive urinalysis. There is nothing in the record that suggests or raises a suspicion that Applicant was using illegal drugs on the day he was selected for and failed to take a urinalysis test. I find for Applicant under SOR ¶ 1.b.

I find Applicant has mitigated the security concerns under personal conduct.

### **Guideline J - Criminal Conduct**

The concerns under criminal conduct are based on a 1979 apprehension for possession of marijuana when Applicant was in the Marine Corps, and three other arrests involving illegal drug possession in November 1990, April 1993, and October 8, 1993. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) apply based on these offenses.

Several mitigating conditions apply to Applicant's case. It has been over 13 years since Applicant's last arrest. Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal conduct was not recent*) applies. Since 1993, Applicant has matured and is aware of the adverse consequences of engaging in such conduct can have on his family and career. He has been married for 27 years and has successfully raised two children. His most recent supervisors have vouched for his work ethic and performance. For these reasons, I find CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) applies.

I conclude that Applicant did not deliberately falsify his security clearance application. As such, he did not violate Title 18, United States Code § 1001. He has mitigated the criminal conduct security concerns.

### **Guideline H - Drug Involvement**

Between 1979 to late 1993, Applicant illegally used marijuana and cocaine on various occasions. His heaviest level of usage was approximately twice a week. A concern is raised under Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse*) and DI DC E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*).

Security concerns based on possession and use of illegal drugs can be mitigated. I find that Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1 (*The drug involvement was not recent*) and DI MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*) applies. Applicant has not used illegal drugs since his last arrest in October 1993. His use of cocaine and marijuana was recreational. He never became addicted to either drug. He has not used illegal drugs in over 13 years and does not intend to use illegal drugs in the future. He avoids his friends who use illegal drugs. His priorities have changed. The security concerns raised by Applicant's use of illegal drugs are mitigated.

### **Whole Person Factors**

In all adjudications, the protection of our national security is the paramount concern. The objective of the security clearance determination process is the fair-minded, common-sense assessment of a person's life to make an affirmative determination that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own

merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence and the "whole person" in evaluating Applicant's security -worthiness. I note that he has outstanding references from his most recent employers. He has a stable family life and has not been involved in illegal drug use or criminal conduct in over 13 years. He has successfully rehabilitated himself. Based on the evidence in the record, it is clearly consistent with the national interest to grant Applicant access to classified information.

### **FORMAL FINDINGS**

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Paragraph 3. Guideline H: FOR APPLICANT

Subparagraph 3.a: For Applicant

### **DECISION**

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Erin C. Hogan

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended.

2. Tr. at 5-7; Gov Ex 1.

3. AE I.

4. Tr. at 42-43.

5. AE J.

6. Gov Ex 4.

7. Tr. at 36-37.

8. AE G; AE J.

9. Tr. at 38; Gov Ex 2 at 3.
10. Gov Ex 2, Gov Ex 5.
11. Gov Ex 2 at 2; Gov Ex 8.
12. Gov Ex 2 at 2; Gov Ex 6; Gov Ex 8.
13. AE C.
14. Tr. at 17, 18; 35-36; Gov Ex 3; Gov Ex 9.
15. Gov Ex 1.
16. *Id.*
17. Tr. at 15-18, 32-35; Answer to SOR.
18. Tr. at 39, 44-45.
19. Tr. at 31.
20. Tr. at 30-31; AE B.
21. AE A.
22. AE B.
23. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
24. Directive, ¶ E2.A5.1.1.
25. Directive, ¶ E2.A10.1.1.
26. Directive, ¶ E2.A8.1.1.
27. Directive, ¶ E2.2.1.
28. *Id.*
29. *Id.*
30. Directive, ¶ E3.1.14.
31. Directive, ¶ E3.1.15.
32. Directive, ¶ E.2.2.2.
33. Department Counsel conceded this point in closing argument.